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No. 90-605

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether regulations setting forth procedures for Federal Aviation Administration civil penalty proceedings were "rules of agency organization, procedure, or practice" exempt from the notice-and-comment requirement of the Administrative Procedure Act.

PARTIES TO THE PROCEEDING

The petitioners, respondents below, are the United States Department of Transportation; Samuel Skinner, Secretary of Transportation; the Federal Aviation Administration; and James B. Busey, Administrator of the FAA.

The respondents are Air Transport Association of America, the petitioner below, and National Air Carrier Association, Inc., American Trans Air, Inc., Southern Air Transport, Inc., World Airways, Inc., Air Line Pilots Association, Aircraft Owners and Pilots Association, America West Airlines, Inc., Albert O. McCauley, Duncan Black Parker, and Herbert G. Vance, petitioners-intervenors below.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	26
Appendix A	1a
Appendix B	32a
Appendix C	33a
Appendix D	35a
Appendix E	92a

TABLE OF AUTHORITIES

Cases:

Akron, Canton & Youngstown R.R. v. *United States*, 370 F. Supp. 1231 (D. Md. 1974)	17
Alcaraz v. *Block*, 746 F.2d 593 (9th Cir. 1984)	17
American Hosp. Ass'n v. *Bowen*, 834 F.2d 1037 (D.C. Cir. 1987)	10, 19
American Transfer & Storage Co. v. *ICC*, 719 F.2d 1283 (5th Cir. 1983)	18
American Trucking Ass'n v. *United States*, 688 F.2d 1337 (11th Cir. 1982), rev'd, 467 U.S. 354 (1984)	18
Associated Dry Goods Corp. v. *EEOC*, 543 F. Supp. 950 (E.D. Va. 1982), rev'd, 720 F.2d 804 (4th Cir. 1983)	19, 20
Batterton v. *Francis*, 432 U.S. 416 (1977)	13
Batterton v. *Marshall*, 648 F.2d 694 (D.C. Cir. 1980)	18-19
British Caledonian Airways, Ltd. v. *CAB*, 584 F.2d 982 (D.C. Cir. 1978)	19
Brown Express, Inc. v. *United States*, 607 F.2d 695 (5th Cir. 1979)	18
Broyles, In re, FAA Order No. 90-23 (Sept. 14, 1990)	22

Cases—Continued: Page

Buckeye Cablevision, Inc. v. *United States*, 438 F.2d 948 (6th Cir. 1971) 20
Cabais v. *Egger*, 690 F.2d 234 (D.C. Cir. 1982) 10, 18
Carroll, In re, FAA Order No. 90-21 (Aug. 16, 1990) 22
Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 9, 12
Colautti v. *Franklin*, 439 U.S. 379 (1979) 12
Continental Airlines, Inc., In re, FAA Order No. 90-18 (Aug. 22, 1990) 22
Degenhardt, In re, FAA Order No. 90-20 (Aug. 16, 1990) 22
Energy Reserves Group, Inc. v. *DOE*, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978) 17
Friedrich v. *Secretary of HHS*, 894 F.2d 829 (6th Cir. 1990) 17
Jean v. *Nelson*, 711 F.2d 1455 (11th Cir. 1983), modified, 727 F.2d 957 (11th Cir. 1984), aff'd, 472 U.S. 846 (1985) 18
Lamoille Valley R.R. v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983) 20
Levesque v. *Block*, 723 F.2d 175 (1st Cir. 1983) 17
Lewis-Mota v. *Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972) 17
National Motor Freight Traffic Ass'n v. *United States*, 268 F. Supp. 90 (D.D.C. 1967), aff'd, 393 U.S. 18 (1968) 4, 10
Neighborhood TV Co. v. *FCC*, 742 F.2d 629 (D.C. Cir. 1984) 20
Ohio Dep't of Human Servs. v. *United States Dep't of HHS*, 862 F.2d 1228 (6th Cir. 1988) 17
Pennsylvania v. *United States*, 361 F. Supp. 208 (M.D. Pa.), aff'd, 414 U.S. 1017 (1973) 17
Pharmaceutical Mfrs. Ass'n v. *Finch*, 307 F. Supp. 858 (D. Del. 1970) 17
Philadelphia Citizens in Action v. *Schweiker*, 669 F.2d 877 (3d Cir. 1982) 25
Pickus v. *United States Bd. of Parole*, 507 F.2d 1107 (D.C. Cir. 1974) 17
Rivera v. *Becerra*, 714 F.2d 887 (9th Cir. 1983), cert. denied, 465 U.S. 1099 (1984) 17
Southern California Edison Co. v. *FERC*, 770 F.2d 779 (9th Cir. 1985) 15, 16

Cases—Continued: Page

USAir, Inc., In re, FAA Order No. 90-22 (Aug. 16, 1990) 22
United States Dep't of Labor v. *Kast Metals Corp.*, 744 F.2d 1145 (5th Cir. 1984) 18
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) 13, 15, 17, 20

Constitution, statutes and regulation:

U.S. Const. Amend. V (Due Process Clause) 5
Act of July 4, 1966, Pub. L. No. 89-487, § 1, 80 Stat. 250 13
Act of June 5, 1967, Pub. L. No. 90-23, § 1, 81 Stat. 54 12-13
Act of Dec. 15, 1989, Pub. L. No. 101-236, § 1, 103 Stat. 2060 3
Act of May 4, 1990, Pub. L. No. 101-281, § 1(a), 104 Stat. 164 3
Act of Aug. 15, 1990, Pub. L. No. 101-370, 104 Stat. 451 ..... 3, 96a
Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 ..... 12, 14
Administrative Procedure Act:
5 U.S.C. 301 12
5 U.S.C. 551(4) 2, 13, 14, 92a
5 U.S.C. 552 ..... 12, 13
5 U.S.C. 552(a) 12
5 U.S.C. 553 ..... 2, 9, 10, 11, 13, 15, 16, 92a
5 U.S.C. 553(a)(2) 11
5 U.S.C. 553(b)(A) 2, 11, 12, 14
5 U.S.C. 553(b)(A)-(B) 4
5 U.S.C. 553(b)-(c) 4
5 U.S.C. 553(b)-(d) 9
5 U.S.C. 557(c)(1) 24
Airport and Airway Safety and Capacity Expansion Act of 1987, § 204(g), 49 U.S.C. App. 1475(g) (Supp. V 1987) 2-3, 94a
49 U.S.C. App. 1475(d)(1) (Supp. V 1987) 3
49 U.S.C. App. 1475(d)(4) (Supp. V 1987) 3
49 U.S.C. App. 1374(d)(2) (Supp. V 1987) 15
49 U.S.C. App. 1471(a)(1) (Supp. V 1987) 15

Miscellaneous: Page

133 Cong. Rec. S15,294 (daily ed. Oct. 28, 1987) 2
K. Davis, *Administrative Law of the Eighties* (1989) 17
1 K. Davis, *Administrative Law Treatise* (2d ed. 1978) 19
2 K. Davis, *Administrative Law Treatise* (2d ed. 1979) 17
44 Fed. Reg. 11,044 (1979) 25
53 Fed. Reg. 34,646 (1988) 3
55 Fed. Reg. (1990):
p. 7980 7
p. 15,110 7
p. 15,134 7
p. 27,548 (July 3, 1990) 7, 21
pp. 27,549-27,550 (July 3, 1990) 22
p. 27,574 (July 3, 1990) 21
p. 27,584 (July 3, 1990) 22
pp. 27,584-27,585 (July 3, 1990) 21
S. Doc. No. 248, 79th Cong., 2d Sess. (1946) 9
Note, *The Substantial Impact Test: Victim of the Fallout from* Vermont Yankee?, 53 Geo. Wash. L. Rev. 118 (1985) 17
United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the United States Department of Transportation; Samuel Skinner, Secretary of Transportation; the Federal Aviation Administration; and James B. Busey, Administrator of the FAA, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is reported at 900 F.2d 369.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1990. A petition for rehearing was denied on June 18, 1990. App., *infra*, 32a. On September 7, 1990, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 5,

1990. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 551(4) and 553 of Title 5 of the United States Code and Section 204(g) of the Airport and Airway Safety and Capacity Expansion Act of 1987, 49 U.S.C. App. 1475 (Supp. V 1987), are set out in an appendix (App., *infra*, 92a-96a).

STATEMENT

In this case, a divided panel of the court of appeals struck down regulations establishing procedures for civil penalty proceedings conducted by the Federal Aviation Administration. The majority held that the regulations were invalid because the FAA failed to comply with the notice-and-comment requirement of the Administrative Procedure Act. In so doing, the majority rejected the government's contention that the challenged rules fell within the exception to that requirement for "rules of agency organization, procedure, or practice" (5 U.S.C. 553(b)(A)). By a 5-5 vote, the court of appeals declined to rehear that question *in banc*.

1. Until 1987, the FAA had only limited authority to adjudicate claims for civil penalties based upon violations of the Federal Aviation Act and associated regulations. With the exception of certain cases involving the transportation of hazardous materials, the agency was required to refer violations subject to civil penalties to the Department of Justice, which would then determine whether to pursue enforcement proceedings in federal district court.

In 1987, recognizing that competing demands on the U.S. Attorneys' offices had led to sporadic enforcement, Congress provided the FAA with additional authority to assess civil penalties.[1] Section 204(g) of the Airport

[1] See 133 Cong. Rec. S15,294 (daily ed. Oct. 28, 1987) (remarks of Sen. Wilson).

and Airway Safety and Capacity Expansion Act of 1987, 49 U.S.C. App. 1475 (Supp. V 1987),[2] empowered the FAA to conduct a "demonstration program" in which the agency could assess civil penalties in amounts up to $50,000.00. As originally enacted, the program was to remain in effect for two years, through December 30, 1989. 49 U.S.C. App. 1475(d)(4). The FAA's authority to assess civil penalties has since been extended on several occasions, most recently through August 1, 1992.[3]

The statute provides that a penalty is to be assessed "only after notice and an opportunity for a hearing on the record in accordance with [5 U.S.C. 554]." 49 U.S.C. App. 1475(d)(1). On September 7, 1988, in order to prescribe procedures through which its new enforcement authority could be exercised, the FAA promulgated its "Rules of Practice for FAA Civil Penalty Actions." 53 Fed. Reg. 34,646 (1988) [hereinafter Rules of Practice].[4] The Rules of Practice set out a comprehensive set of procedures for civil penalty proceedings—covering such matters as pleadings, representation of parties, scheduling, discovery, motions, hearings, and administrative appeals. App., *infra*, 38a-91a. The FAA made the rules effective immediately upon their publication in the *Federal Register*. App., *infra*, 35a; see *id.* at 37a.

2. The Air Transport Association of America (ATA), a trade association consisting of American air carriers, petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Rules of

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[2] Unless otherwise indicated, all citations to 49 U.S.C. App. are to Supplement V to the 1982 edition of the United States Code.

[3] See Act of Dec. 15, 1989, Pub. L. No. 101-236, § 1, 103 Stat. 2060 (four-month extension); Act of May 4, 1990, Pub. L. No. 101-281, § 1(a), 104 Stat. 164 (additional three-month extension); Act of Aug. 15, 1990, Pub. L. No. 101-370, 104 Stat. 451 (extension through August 1, 1992).

[4] The Rules of Practice, together with excerpts from the explanatory statement accompanying them, are set forth in an appendix. App., *infra*, 35a-91a.

Practice, and other parties intervened to challenge the rules. See p. ii, *supra*. The ATA and the intervenors argued, *inter alia*, that the Rules of Practice were invalid because the FAA had promulgated them without complying with the notice-and-comment requirement of the APA, 5 U.S.C. 553(b)-(c). The government responded that the Rules of Practice were exempt from the notice-and-comment requirement, because they were "rules of agency organization, procedure, or practice" and because the agency had properly found, in view of the time constraints placed by Congress on the civil penalty program, that good cause existed for dispensing with notice and comment. See 5 U.S.C. 553(b)(A)-(B); App., *infra*, 35a-37a. A divided court of appeals held that neither exception to the notice-and-comment requirement was applicable.

a. The majority (Edwards and Mikva, JJ.) ruled that the exemption for "rules of agency organization, procedure, or practice" does "*not* apply to agency action that 'substantially alter[s] the rights or interests of regulated' parties." App., *infra*, 2a. The Rules of Practice failed that test, the majority held, "because they substantially affect civil penalty defendants' 'right to avail [themselves] of an administrative adjudication.'" *Ibid.* (quoting *National Motor Freight Traffic Ass'n* v. *United States*, 268 F. Supp. 90, 96 (D.D.C. 1967) (three-judge court), aff'd mem., 393 U.S. 18 (1968)). See App., *infra*, 11a, 13a, 14a, 15a, 18a-19a.

The majority dismissed as "unpersuasive" the government's contention that the Rules of Practice were rules of agency "procedure" or "practice" because they established procedures for civil penalty proceedings and had no effect on substantive obligations imposed on the aviation community. App., *infra*, 11a-12a; see *id.* at 18a. "Rather than focus on whether a particular rule is 'procedural' or 'substantive,'" the majority declared, the circuit's prior decisions mandated a "functional analysis." *Id.* at 12a. Under this analysis, "[w]here nomin-

ally 'procedural' rules 'encode[] a substantive value judgment' or 'substantially alter the rights or interests of regulated' parties," the exemption for rules of agency procedure is unavailable (*id.* at 13a); that exception is a "mere 'housekeeping' measure" reserved for rules organizing an agency's "*internal* operations" (*id.* at 17a; see *id.* at 12a, 18a). An agency can be allowed "to forgo notice and comment," the majority said, "only when the subject matter or the circumstances of the rulemaking divest the public of any legitimate stake in influencing the outcome." *Id.* at 11a; see *id.* at 15a-16a, 24a.

Applying this "functional analysis," the majority found that the Rules of Practice "substantially affect a civil penalty defendant's *right to an administrative adjudication*" under the Due Process Clause and the APA. App., *infra*, 13a. Whether or not the Rules of Practice violate any such right, the majority explained, the rules embodied "discretionary—indeed, in many cases, highly contentious—choices concerning what process civil penalty defendants are due," and those choices " 'encode[d] a substantive value judgment' * * * on the appropriate balance between a defendant's *right* to adjudicatory procedures and the agency's interest in efficient prosecution." *Id.* at 13a & n.8. Thus, the majority declared, "[t]he FAA was no less obliged to engage in notice and comment before taking action affecting these adjudicatory rights than it would have been had it taken action affecting aviators' 'substantive' obligations under the Federal Aviation Act." *Id.* at 13a.

In fashioning a remedy, the majority acknowledged that not all of the Rules of Practice "touch on civil penalty defendants' rights to adjudication," but it nevertheless refused to limit its decision to rules having such an effect. App., *infra*, 16a n.12. "At a minimum," the court said, "the FAA was obliged to engage in notice and comment before promulgating the Rules implementing the APA's procedures for formal adjudication, *see* 5 U.S.C. §§ 554, 556-557." *Ibid.* The decision prohibited the FAA

from initiating any new penalty proceedings—or going forward in pending cases—under the Rules of Practice. *Id.* at 23a. Acknowledging the disruption that would accompany wholesale dismissals of civil penalty proceedings, however, the majority permitted the agency to hold pending cases in abeyance until it had promulgated new rules in accordance with the court's decision. *Ibid.* But the majority noted that a defendant would "be free to raise the defense that the FAA could not have successfully prosecuted him but for the agency's reliance" on any aspect of the rules that might be abandoned in a subsequent rulemaking. *Ibid.* The majority also took "no position on whether parties whose cases have reached a *final* determination under the [Rules of Practice] may now raise the procedural invalidity of the Rules as a ground for seeking review." *Id.* at 23a-24a.[5]

b. Judge Silberman dissented. While observing that "[l]ines between substance and procedure in various areas of the law are difficult to draw," he concluded that Congress "made that difference critical" in the APA and thus obligated courts "to implement a viable distinction between 'procedural' rules and those that are substantive." App., *infra*, 25a. In "a spectrum of rules running from the most substantive to the most procedural," he continued, the former would be "those that regulate 'primary conduct' " and the latter would be rules, such as those at issue here, "which deal with enforcement or adjudication of claims of violations of the substantive norm." *Id.* at 26a. He suggested that the majority's

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[5] The majority also held that the notice-and-comment issue was ripe for review (a conclusion with which the dissent agreed), App., *infra*, 7a-9a; *id.* at 25a (Silberman, J., dissenting); that there was no "good cause," as that APA term had been interpreted by the courts, justifying the FAA's decision not to engage in notice-and-comment rulemaking, *id.* at 19a-20a; and that the agency's failure to follow that course was not cured by its willingness to receive and respond to comments submitted after the Rules of Practice became effective, *id.* at 20a-22a. We do not seek further review of these determinations.

analysis—which found the Rules of Practice not to be "rules of agency * * * procedure" because they affected a right to an adjudication—was "circular reasoning" (*id.* at 26a-27a) and would "result[] in the obliteration of the distinction that Congress demanded" (*id.* at 29a). Judge Silberman also noted that the majority's reasoning would make it "impossible for any agency general counsel, in the future, safely to advise agency heads that a given set of proposed rules are procedural and do not have to be published for comment" (*id.* at 26a).

3. The government filed a petition for rehearing with a suggestion of rehearing *in banc*. By a 5-5 vote, the court of appeals denied rehearing *in banc*. App., *infra*, 33a-34a.

4. After the case had been argued, but before the panel issued its decision, the FAA published a *Federal Register* notice proposing modifications of its rules to meet some of the specific objections advanced by the ATA and the intervenors. 55 Fed. Reg. 7980 (1990). When the panel issued its decision, the agency was on the verge of promulgating those amendments in final form. In an effort to minimize disruption of its enforcement program, the FAA issued the amendments, suspended their effective date, and simultaneously published all of the Rules of Practice, as amended, as a proposed rule. 55 Fed. Reg. 15,110, 15,134 (1990). Final, amended rules of practice were issued, after the agency had received comments from the public, on July 3, 1990. 55 Fed. Reg. 27,548 (1990). These rules became effective on August 2, 1990.

REASONS FOR GRANTING THE PETITION

The majority's holding—that the FAA's Rules of Practice did not qualify as "rules of agency organization, procedure, or practice" because they substantially affected civil penalty defendants' right to an administrative adjudication—represents a serious departure from the basic structure of the APA. The court's decision also conflicts squarely with a decision from the Ninth Circuit upholding procedural rules issued by FERC. In that case, the Ninth Circuit specifically rejected a contention that the applicability of the exemption depended on the magnitude of a rule's impact on private parties' interests. This Court's review is warranted to resolve both the scope of the exception for rules of agency procedure and the much-debated question of whether rules having a "substantial impact" on private parties are ineligible for the exceptions to the notice-and-comment requirement.

The court of appeals' decision is important to the FAA and other federal agencies. The decision casts doubt on the substantial number of civil penalty proceedings that were pending at the time of the decision. The majority's interpretation will certainly encourage challenges to rules of procedure promulgated by other agencies without notice and comment. Finally, as the dissent noted, the practical effect of the decision is to make it impossible for agencies to rely in the future on the exemption for "rules of agency organization, procedure, or practice." With the possible exception of the most mundane housekeeping provisions, any procedural regulation promulgated without notice and comment will be vulnerable to a *post hoc* determination that it encodes a value judgment, extends beyond an agency's internal operations, substantially alters the rights or interests of regulated parties, or calls in some measure for public participation—all grounds relied upon by the majority below, but not specified in the statute.

1. The APA divides agency rules into several categories and prescribes the procedures required for promulgation of each type. As this Court has observed, the "central distinction" is "between 'substantive rules' on the one hand and 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice' on the other." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301 (1979). When issuing "substantive rules," an agency must employ notice-and-comment rulemaking and, in general, must postpone the effective date of a final rule until 30 days after it has been published in the *Federal Register*. See 5 U.S.C. 553(b)-(d). The other categories referred to in *Chrysler Corp.*—interpretative rules, general statements of policy, and rules of agency organization, procedure, and practice—are exempt from the notice-and-comment requirement and may be made effective immediately upon publication. 5 U.S.C. 553(b)-(d).

The drafters of the APA—confident that "[t]he meaning of the phrase 'substantive rule' [was] well defined in court decisions and upon principle" (S. Doc. No. 248, 79th Cong., 2d Sess. 19 (1946))—chose not to include statutory definitions of the categories of rules referred to in Section 553. Nevertheless, as the dissent noted, a court is obliged to adhere to the basic framework set out in the statute—*i.e.*, "to implement a viable distinction between 'procedural' rules and those that are substantive." App., *infra*, 25a.

a. In this case, the majority dismissed that "central distinction" (*Chrysler Corp.* v. *Brown*, 441 U.S. at 301) altogether. Responding to the dissent's criticism that its analysis would "result[] in the obliteration of the distinction" between procedure and substance "that Congress demanded" (App., *infra*, 29a), the majority declared iconoclasticly that "there is no such 'distinction' to obliterate for purposes of section 553(b)(A)" (*id.* at 17a). Likewise, the majority dismissed the FAA's con-

tention that the Rules of Practice did not affect the substantive obligations of the aviation community as "irrelevant." *Id.* at 18a.

Instead of attempting to apply the distinction set forth in the statute, the majority devised a "functional approach" having absolutely no connection to the statutory text. Nothing in the statute suggests that the applicability of the notice-and-comment requirement depends on the magnitude of its effect on " 'the rights or interests of regulated' parties" (App., *infra*, 18a).[6] The

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[6] The majority relied heavily on *National Motor Freight Ass'n* v. *United States*, *supra*, in fashioning its analytical approach. In that case, a three-judge court sustained a challenge to a rule establishing a mechanism through which a shipper and a carrier could voluntarily agree to "reparations"—in effect, refunds of amounts paid by the shipper—subject to a determination by the ICC that the original rate charged was unlawful. The precise basis for the holding was opaque, but the court appears to have relied upon its judgment that the rule was sufficiently significant in its impact to trigger the notice-and-comment requirement. See, *e.g.*, 268 F. Supp. at 95 (informal, voluntary reparations procedure was not "so insignificant in nature and impact as to fall outside the rule-making requirements of Section [553]"); 268 F. Supp. at 97 (ICC took a "significant step" that was "within the purview of the Congressional prescription of rule-making requirements contained in Section [553]"). Contrary to the majority's suggestion in this case, the *National Motor Freight* court did not hold that any rule affecting a right to an adjudication would trigger Section 553. Indeed, the language invoked by the majority in this case was an excerpt from an observation having no relevance to the issue presented here. Referring to the fact that carriers and shippers who agreed to reparations would obtain an ICC ruling on the legality of amounts previously paid, the court stated that "[a] right to avail oneself of an administrative adjudication of this kind does not become trivial simply because it is optional." 268 F. Supp. at 96. Nothing in the opinion remotely suggests that this observation was integral to the court's holding.

As the dissent noted (App., *infra*, 30a), this Court's summary affirmance of *National Motor Freight* did not constitute approval of the three-judge court's reasoning. In *Cabais* v. *Egger*, 690 F.2d 234, 237 (1982), the D.C. Circuit suggested that *National Motor Freight* had been undercut by *Vermont Yankee*. The rule at issue in *National Motor Freight*—which created a new remedy in the

APA does not distinguish between rules that "encode a substantive value judgment" and those that do not, nor does it suggest that courts should inquire whether an agency has made "discretionary" or "contentious" choices bearing on private parties' rights or interests (*id.* at 13a). There is nothing presumptively non-procedural about rules "implementing the APA's procedures for formal adjudication" (*id.* at 16a n.12; see *id.* at 13a); on the contrary, such rules would seem to be "procedural" almost by definition. Nor does the text of the APA provide any support for the proposition that a rule of agency procedure cannot extend beyond an agency's "internal operations" (*id.* at 17a, 18a).

b. The various judicial "tests" articulated in the majority's opinion—in the main, excerpts lifted from various prior D.C. Circuit opinions—were applied as substitutes for the statutory text. The majority justified this approach with the observation that "[t]he characterizations 'substantive' and 'procedural' * * * do not guide inexorably to the right result, nor do they really advance the inquiry very far." App., *infra*, 18a. In so doing, the majority overlooked provisions of the APA that cast considerable light on the distinction between "substantive rules" and "rules of agency organization, procedure, or practice" in favor of a smorgasbord of extra-statutory standards that have developed a life of their own—independent of the law enacted by Congress. Various provisions of the APA make it clear that the majority's analysis is untenable.

First, Section 553 does not apply at all to "a matter relating to agency management or personnel" (5 U.S.C. 553(a)(2)). Thus, if the additional exception set out in Section 553(b)(A) is limited to "internal operations,"

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context of a statute in which Congress had assigned specific roles to the courts and the ICC in reparations cases—bears no resemblance to the rules at issue here.

as the majority stated, it is superfluous.[7] It is, of course, an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979).

Second, the reference in Section 553(b)(A) to "rules of agency organization, procedure, or practice" is a shorthand reference to a category of rules described more fully in the APA's publication requirement. In enumerating the categories of materials that agencies would be required to publish, the predecessor of Section 552, 60 Stat. 238 (§ 3), distinguished between "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public," on the one hand, and, on the other (emphasis added):

> (1) descriptions of [an agency's] central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; [and] (2) statements of the general course and method by which its functions are channeled and determined, including *the nature and requirements of all formal or informal procedures available* as well as forms and instructions as to the scope and contents of all papers, reports, or examinations.[8]

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[7] Contrary to the majority's suggestion (App., *infra*, 12a, 17a-18a), this Court's decision in *Chrysler Corp.* v. *Brown*, 441 U.S. at 309-310, did not determine that the APA exception for "rules of agency organization, procedure, or practice" is limited to "housekeeping" matters. When it spoke of a "housekeeping" statute in *Chrysler Corp.*, the Court was referring to 5 U.S.C. 301. See App., *infra*, 26a-27a n.2 (Silberman, J., dissenting).

[8] We have cited to this provision because it was enacted at the same time as the exception for "rules of agency organization, procedure, or practice" and is thus the best indicator of the intention of the Congress that enacted that exception. The current version of Section 552(a) reflects amendments enacted in 1967, Act of

This provision and Section 553 may properly be read *in pari materia.*[9] Thus, it is clear that the "rules of agency * * * procedure" encompassed by Section 553(b)(A) include those establishing "*all formal or informal procedures available*" (plainly, to the public), not just the internal housekeeping matters encompassed by the majority's interpretation.

Finally, the APA definition of a "rule," 5 U.S.C. 551(4), contrasts procedural rules with rules that are designed to implement, interpret or prescribe law or policy. According to that definition, a rule is "the whole or a part of an agency statement of general or particular applicability and future effect"

June 5, 1967, Pub. L. No. 90-23, § 1, 81 Stat. 54. (These amendments were originally enacted in 1966, see Act of July 4, 1966, Pub. L. No. 89-487, § 1, 80 Stat. 250, but were reenacted to incorporate them in the 1966 recodification of Title 5.) The amendments are not, in our view, material to the issues presented here.

[9] The "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public" are unmistakable references to the "substantive rules," "general policy statements," and "interpretative rules" referred to in Section 553. The other paragraphs thus may be taken as a description of the "rules of agency organization, procedure, or practice" referred to in Section 553.

The Attorney General's Manual on the APA relied heavily on the parallel between the predecessors of Sections 552 and 553 in explaining the intent of those provisions. It stated that "the rules of organization and procedure which an agency must publish pursuant to section 3(a)(1) and (2) [quoted above in text] are not ordinarily subject to the requirements of section 4(a) and (b) [now 5 U.S.C. 553(b) and (c)]." United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 & n.3 (1947). This Court has relied upon the Manual's interpretations of the categories of rules established by the APA, "because of the role played by the Department of Justice in drafting the legislation." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978). See *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977).

—"designed to implement, interpret, or prescribe law or policy or"

—"describing the organization, procedure, or practice requirements of an agency * * *"

The second of these categories is the same as the category of "rules of agency organization, procedure, or practice" exempted by Section 553(b)(A) from notice-and-comment rulemaking. Here again, it is clear that the drafters envisaged a distinction between rules that implemented the agency's substantive mission—those that "implement, interpret, or prescribe law or policy"—and those that set forth the agency's procedures and practice requirements.

In short, the drafters of the APA did not share the majority's view that there is no intelligible difference between procedure and substance. Nor did they leave courts with nothing to apply but an abstract distinction between procedural and substantive rules. The various provisions of the APA discussed above sketch a common-sense distinction between substantive rules—rules that are designed to implement or prescribe law (see 5 U.S.C. 551(4))—and procedural rules—rules setting forth "all formal and informal procedures available" (60 Stat. 238), including the agency's "practice requirements" (5 U.S.C. 551(4)).

There is no need to resort to the various tests applied by the majority in this case, and doing so distorts the pertinent inquiry. Whatever the result of the refined analyses invoked by the majority below, when one looks at the APA and the FAA Rules of Practice it seems plain that the Rules of Practice are rules of agency "procedure" or "practice." They set forth formal and informal procedures and practice requirements of the FAA for civil penalty proceedings. They do not purport to "implement, interpret, or prescribe law or policy"—*i.e.*, the standards governing the aviation community or the penalties for violations of those standards.[10] Those

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[10] The majority stated that the Rules of Practice "established a schedule of civil penalties, including fines of up to $10,000 for

standards are prescribed in the Federal Aviation Act or in substantive rules issued after notice and comment.

c. Finally, the APA does not, as the majority suggested, empower courts to exercise their judgment as to whether or not "the need for public participation [is] 'too small to warrant it'" (App., *infra*, 24a; see *id.* at 11a, 15a-16a). Congress weighed the benefits of public participation in rulemaking against the costs and struck the balance by specifying categories of rules which could be promulgated without resort to notice-and-comment rulemaking. As this Court observed in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523 (1978), the APA "settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'" "[G]enerally speaking," Section 553 of the APA "established the maximum procedural requirements which Congress was willing to have the courts impose on agencies in conducting rulemaking procedures." 435 U.S. at 524. Just as these principles prohibit the imposition of procedural requirements more stringent than those specified by Section 553, they also require that Section 553's exceptions be evenhandedly construed. The decision in this case—which narrows the exception for "rules of agency organization, procedure, or practice" to rules governing an agency's "internal operations" and makes the availability of the exception dependent upon criteria that have no foundation in the statutory text—represents a serious departure from the basic structure of the APA and thus from the principles set forth in *Vermont Yankee*.

2. There is a square conflict between the court of appeals' decision in this case and the Ninth Circuit's decision in *Southern California Edison Co.* v. *FERC*, 770

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violations of the safety standards of the Federal Aviation Act and related regulations." App., *infra*, 5a. The majority was mistaken. The regulations merely reiterate penalties set forth in the statute. Compare App., *infra*, 41a-43a with 49 U.S.C. App. 1374(d)(2), 1471(a)(1).

F.2d 779 (1985). In *Southern California Edison*, two utilities challenged a rule, promulgated without prior notice and comment, establishing procedures for final approval of rates for power marketed by the Bonneville Power Administration.[11] The utilities argued that notice-and-comment rulemaking was required because certain of the rules "would have a substantive effect on parties to BPA final rate approval proceedings." *Id.* at 783. The court rejected that contention, explaining (*ibid.*):

> Section 553(b)(3)(A) of the APA exempts "rules of agency organization, procedure, or practice" from the notice and comment requirement. In light of that express exemption, we have rejected the notion that procedural rules with a substantive impact are subject to the notice and comment requirements. * * * As noted above, the regulations pertain to the procedural aspects of FERC's approval of BPA rates: intervention, requests for refunds for interim rates and for final confirmation and approval. Accordingly, we conclude that the promulgation of 18 C.F.R. § 300.21 was not subject to the APA's notice and comment requirement.

Under *Southern California Edison*'s interpretation of the exception for rules of agency procedure, it is irrelevant whether a rule has a "substantive impact" on private parties. By contrast, in this case, the majority ruled that the exception does not apply to agency action that substantially affects the rights or interests of regulated parties. App., *infra*, 2a. There is a square conflict between these approaches. This conflict did not arise with this case. There has long been disagreement among the courts of appeals with respect to the question whether a so-called "substantial impact" test has any legitimate role

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[11] In 1981, the FERC issued an interim rule establishing procedures for interim approval of BPA rates. After receiving comments on the interim rule, the FERC issued a final rule that added a new provision establishing procedures for final rate approval. That new provision was made immediately effective. The parties and the court assumed that Section 553 applied separately to the new provision issued without prior notice. 770 F.2d at 781-783.

to play in determining the rules to which the notice-and-comment requirement applies.

Before *Vermont Yankee*, courts relied heavily on the "substantial impact" test in applying the exceptions to the notice-and-comment requirement of the APA.[12] Following *Vermont Yankee*, however, the Ninth Circuit rejected the substantial impact test altogether, finding it inconsistent with this Court's admonition that courts were not to "engraft[] their own notions of proper procedures upon agencies entrusted with substantive functions by Congress" (435 U.S. at 525). See *Rivera* v. *Becerra*, 714 F.2d 887, 889-891 (9th Cir. 1983), cert. denied, 465 U.S. 1099 (1984); *Alcaraz* v. *Block*, 746 F.2d 593, 613 (9th Cir. 1984).[13]

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[12] See, *e.g.*, *Pickus* v. *United States Bd. of Parole*, 507 F.2d 1107, 1114 (D.C. Cir. 1974); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972); *Akron, Canton & Youngstown R.R.* v. *United States*, 370 F. Supp. 1231, 1236-1240 (D. Md. 1974) (three-judge court); *Pennsylvania* v. *United States*, 361 F. Supp. 208, 220-222 (M.D. Pa.) (three-judge court), aff'd mem., 414 U.S. 1017 (1973); *Pharmaceutical Mfrs. Ass'n* v. *Finch*, 307 F. Supp. 858, 863 (D. Del. 1970). See also 2 K. Davis, *Administrative Law Treatise* §§ 7:18-7:20 (2d ed. 1979); K. Davis, *Administrative Law of the Eighties* § 7:20 (1989); Note, *The Substantial Impact Test: Victim of the Fallout from* Vermont Yankee?, 53 Geo. Wash. L. Rev. 118 (1985).

[13] At least in cases involving the distinction between interpretative and legislative rules, the Sixth Circuit seems to have rejected the test. *Friedrich* v. *Secretary of HHS*, 894 F.2d 829, 836 (1990) ("extent of the impact is not an indicative factor in our search for the proper characterization of" the rule at issue); *Ohio Dep't of Human Servs.* v. *United States Dep't of HHS*, 862 F.2d 1228, 1233-1234 (1988). Similarly, the First Circuit has restricted the role of the "substantial impact" test in that context. *Levesque* v. *Block*, 723 F.2d 175, 182 (1983) (in distinguishing between interpretative and legislative rules, "whether a rule has a substantial impact may be relevant in construing the intent of the agency in issuing the rule"). See also *Energy Reserves Group, Inc.* v. *DOE*, 589 F.2d 1082, 1093-1098 (Temp. Emer. Ct. App. 1978) (opinion of Becker, J.) (criticizing the substantial impact test).

Other circuits have continued to employ the substantial impact test in applying express exceptions to the notice-and-comment requirement. For instance, the Fifth Circuit has described the substantial impact test as "the primary means by which courts look beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation." *United States Dep't of Labor* v. *Kast Metals Corp.*, 744 F.2d 1145, 1153 (1984); accord *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 701-702 (5th Cir. 1979) (substantial impact test is "proper test * * * in considering a rule that may arguably fall under the exemptions for 'procedural rules' "). In *Kast Metals*, the Fifth Circuit specifically declined to follow the Ninth Circuit in rejecting the substantial impact test. 744 F.2d at 1154 n.19.[14]

Before this case, the D.C. Circuit had given conflicting signals regarding its adherence to the "substantial impact" test. In *Cabais* v. *Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982), the court declared that "[s]imply because agency action has substantial impact does not mean it is subject to notice and comment if it is otherwise expressly exempt under the APA." The court also observed that "the substantial impact test has no utility in distinguishing between" interpretative rules and substantive rules, but suggested that the test "may be useful" in applying other exceptions to the notice-and-comment requirement. *Id.* at 237-238. See also *Batterton* v. *Mar-*

[14] The Eleventh Circuit, although viewing the former Fifth Circuit's decision in *Brown Express* as part of the law of its circuit, has gone to unusual lengths to criticize it, in *dicta*, as contrary to *Vermont Yankee*. See *American Trucking Ass'n* v. *United States*, 688 F.2d 1337, 1351-1352 & n.20 (11th Cir. 1982), rev'd on other grounds, 467 U.S. 354 (1984); *Jean* v. *Nelson*, 711 F.2d 1455, 1479-1480 & nn.18, 20 (11th Cir. 1983), modified on other grounds on rehearing, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985). See also *American Transfer & Storage Co.* v. *ICC*, 719 F.2d 1283, 1285 (5th Cir. 1983) (noting that *Brown Express* had been "much criticized").

shall, 648 F.2d 694, 707-709 & n.83 (D.C. Cir. 1980). In *American Hosp. Ass'n* v. *Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987), the court observed—with respect to the exception for procedural rules—that its cases had "gradually shifted focus from asking whether a given procedure has a 'substantial impact' on parties * * * to inquiring more broadly whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior." This shift in focus, the court observed, "reflect[ed] a candid recognition that even unambiguously procedural measures affect parties to some degree." *Ibid.*

The decision in the instant case represents an abrupt departure from the trend described in *American Hospital Ass'n*. The stated basis for the decision was a determination that the Rules of Practice "substantially affect" the rights of civil penalty defendants to an administrative adjudication. App., *infra*, 2a, 11a, 13a. Like decisions of the Fifth Circuit, the majority's analysis makes the effect of a rule the decisive factor in the application of the APA exception for rules of agency procedure.[15]

This case presents the Court with an excellent opportunity to resolve a square conflict—between the D.C. and the Fifth Circuits on the one hand and the Ninth on the other—over whether the availability of the exemp-

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[15] The majority claimed not to rely on the "substantial impact" test. App., *infra*, 17a. However, its explanation of how its approach differed from that test is unpersuasive. There is no difference between a test that focuses on whether procedural rules "substantially affect" the rights or interests of regulated parties and one that focuses on whether the rules have a "substantial impact" on private parties. The *National Motor Freight* case, the principal authority on which the majority relied, has been credited with originating the substantial impact test. See *Associated Dry Goods Corp.* v. *EEOC*, 543 F. Supp. 950, 964 (E.D. Va. 1982), rev'd, 720 F.2d 804 (4th Cir. 1983); *British Caledonian Airways, Ltd.* v. *CAB*, 584 F.2d 982, 989 (D.C. Cir. 1978). See also 1 K. Davis, *Administrative Law Treatise* § 6.29, at 589 (2d ed. 1978).

tion for "rules of agency organization, procedure, or practice" depends on the magnitude of a rule's effects on private parties. The validity of the "substantial impact" test has been widely discussed in the circuits during the 11 years since *Vermont Yankee*, in the context of several exemptions to the notice-and-comment requirement. The debate continues. The D.C. Circuit, the court in which "the vast majority of challenges to administrative agency action are brought," *Vermont Yankee*, 435 U.S. at 537 n.14, is sharply divided over the merits of the majority's approach. It denied the government's suggestion of rehearing *in banc* by a 5-5 vote. Even if the full D.C. Circuit were to resolve the confusion in its decisions in the near future, the conflict between the Fifth and Ninth Circuits would remain. Only this Court is in a position to restore consistency to this area of the law.[16]

3. The decision in this case is important to the FAA and to all other federal agencies that are subject to the APA.

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[16] The majority's assertion that the APA exception for procedural rules is limited to rules organizing agencies' "internal operations" (*e.g.*, App., *infra*, 18a) is also in conflict with decisions that have applied that exception to rules governing proceedings involving regulated parties. See *Associated Dry Goods Corp.* v. *EEOC*, 720 F.2d 804, 812 (4th Cir. 1983); *Buckeye Cablevision, Inc.* v. *United States*, 438 F.2d 948, 953 (6th Cir. 1971); *Neighborhood TV Co.* v. *FCC*, 742 F.2d 629, 636-639 (D.C. Cir. 1984); *Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295, 327-328 (D.C. Cir. 1983). The majority described those decisions as "inapposite." Although the rules at issue in those cases "did affect 'the manner in which the parties present themselves or their viewpoints to the agency,'" the majority stated, "they did *not* affect any component of a party's statutory or constitutional right to avail himself of an administrative adjudication" and thus "'the need for public participation' in the rulemaking process was 'too small to warrant it.'" App., *infra*, 15a-16a. The distinction suggested by the majority is unworkable; further, it suggests, erroneously, that courts are to determine when the need for public participation rises to the level justifying notice and comment. Congress made that judgment in the APA in distinguishing between substantive and procedural rules.

a. The decision casts doubt upon a substantial number of civil penalty proceedings that were conducted in part under the Rules of Practice struck down by the court. As of the date of the court of appeals' opinion, the FAA had issued 5860 notices of proposed civil penalty, the first step toward assessing a penalty under the demonstration program. Over 1100 of the notices were issued to ATA's members. By the date of the panel's decision, 2128 of those matters (including 76 to which an ATA member was a party) had been resolved by means of orders assessing penalties, the final agency action in such a proceeding.[17] We are advised that some of the remaining cases have been dismissed. Nevertheless, there are presently pending thousands of cases to which the Rules of Practice were applied before they were struck down.

Those cases were held in abeyance between the date that the court of appeals issued its opinion and August 2, 1990, the effective date of the amended rules of practice promulgated by the FAA following notice and comment. See 55 Fed. Reg. 27,548 (July 3, 1990). In its decision, the court of appeals stated that a defendant in any such case "will * * * be free to raise the defense that the FAA could not have successfully prosecuted him but for

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[17] An FAA civil penalty proceeding commences with the issuance of a notice of proposed civil penalty. A party receiving such a notice has several options. It may submit the amount of the proposed penalty, invoke an informal procedure for resolving disputes, and, with or without employing the informal procedure, request a formal hearing. 55 Fed. Reg. 27,574 (July 3, 1990). After an ALJ has issued a decision following such a hearing, a party wishing to challenge an unfavorable decision has rights to administrative appeals. *Id.* at 27,584-27,585. An order assessing civil penalty is the final step in any proceeding in which a civil penalty defendant agrees to pay or is found liable for a penalty. Depending on the extent to which a party pursues available procedures, such an order may be entered following a voluntary payment in response to a notice of proposed penalty, at any stage of the administrative proceeding in which the party declines to proceed further, or following exhaustion of all administrative appeals.

the agency's reliance on some aspect of the Penalty Rules abandoned in the new scheme." App., *infra*, 23a. Already, the Administrator of the FAA has issued five decisions—two of them involving ATA members—in which he has addressed *sua sponte* the question whether amendments to the Rules of Practice struck down by the court might have affected the outcome.[18] As cases pending on April 13, 1990, are brought before the Administrator, he will undoubtedly be called upon to address that issue with increasing frequency.[19]

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[18] *In re Broyles*, FAA Order No. 90-23 (Sept. 14, 1990); *In re Continental Airlines, Inc.*, FAA Order No. 90-18 (Aug. 22, 1990); *In re Degenhardt*, FAA Order No. 90-20 (Aug. 16, 1990); *In re Carroll*, FAA Order No. 90-21 (Aug. 16, 1990); *In re USAir, Inc.*, FAA Order No. 90-22 (Aug. 16, 1990). In each of these cases, except for *Degenhardt*, the civil penalty defendant asserted that the Rules of Practice were invalid because they had been issued without notice and comment and that, as a result, any penalty had to be vacated. The Administrator rejected that contention, noting that the decision in this case expressly permitted the FAA to hold pending proceedings in abeyance. However, in each case, he went on to consider the claim reserved by the court of appeals. In four cases, he found no basis for a conclusion that the application of the Rules of Practice (as opposed to the subsequent, amended rules) could have affected the outcome. In *USAir*, he found that a change regarding service of a notice of proposed penalty could have affected the outcome, and he vacated the penalty at issue.

No significance should be attributed to the fact that the Administrator has so far addressed the issue raised by the court of appeals' majority *sua sponte*. The amended rules did not become effective until August 2, 1990, and upon their effective date, all time periods prescribed by those rules began to run anew. 55 Fed. Reg. 27,549-27,550 (July 3, 1990). A 50-day limit applies to briefs challenging decisions issued by an ALJ. *Id.* at 27,584. Because of this circumstance (and extensions granted by the agency), no brief in chief was filed by a civil penalty defendant between August 2 and October 1, 1990.

[19] One party against whom a civil penalty had been assessed before the court of appeals decision has petitioned for review in the Sixth Circuit and has argued that the Rules of Practice are invalid by virtue of the agency's failure to follow the notice-and-comment requirement. *Playter* v. *FAA*, No. 90-3420 (6th Cir.). The case has been fully briefed, but has not yet been scheduled for argument.

After the court of appeals' decision, the agency announced it would voluntarily entertain requests to remand cases in which a civil penalty defendant can demonstrate that an amendment to the Rules of Practice would likely have affected the outcome of a case. 55 Fed. Reg. 15,125 (1990). However, there remains a live controversy concerning whether the notice-and-comment requirement was applicable to the Rules of Practice. If (as we maintain) the requirement was inapplicable, the failure to employ notice-and-comment rulemaking would provide no basis for invalidating any penalty assessed in a case pending at the time of the court of appeals' decision. Under the court of appeals' decision, by contrast, the agency's determinations will remain vulnerable to challenge on that ground—under standards left unclear by that decision. Defendants denied remands by the agency will be in a position to argue that the court of appeals' decision entitles them to relief.[20]

b. The standards set forth in the majority's opinion will invite challenge to any existing procedural rule that has been issued without notice and comment and will make it impossible, in practice, to rely on the exception for rules of procedure. Ironically, while the majority dismissed the statutory distinction between procedural and substantive rules as unhelpful (see App., *infra*, 18a), it employed a "functional analysis" (*id.* at 12a) that is far less determinate. Under that approach, the

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[20] There is no doubt that at least some of the parties that challenged the rule retain an interest in the outcome of this case. For instance, ATA's members were parties to approximately 1100 cases as of the date of the court of appeals' opinion. ATA petitioned for review as a representative of its members; thus, to the extent its members have a continuing controversy with the FAA, ATA continues to have a live dispute with the FAA. The same may be said of other parites representing members to which the Rules of Practice were applied and of air carriers that are parties to proceedings in which the Rules of Practice were applied at some point. We are advised that the civil penalty proceedings brought against the three individual intervenors have been dismissed; the Rules of Practice invalidated by the court of appeals will not be applied to them. The case is moot as to those individuals.

exception for procedural rules will not apply to any rule that substantially alters the rights or interests of affected parties, including statutory rights to administrative procedures. See *id.* at 2a, 13a. The effect on a procedural right can be substantial without rising to the level of a violation (see *id.* at 13a n.8), but it is not sufficient that the rule merely affects "the manner in which the parties present themselves to the agency" (*id.* at 15a). It is also relevant whether a rule "encode[s] a substantive value judgment" on "the appropriate balance between a defendant's *right* to adjudicatory procedures and the agency's interest in efficient prosecution" or extends beyond "internal operations." *Id.* at 13a, 17a, 18a. The majority acknowledged that "not *all* of the procedures established by [the Rules of Practice] touch on civil penalty defendants' rights to adjudication," but declined to specify which were invalid under that test. *Id.* at 16a n.12.

As the dissent noted, standards of this nature will make it "impossible for any agency general counsel, in the future, safely to advise agency heads that a given set of proposed rules are procedural and do not have to be published for comment." App., *infra*, 26a. Virtually any rule of agency procedure will be vulnerable to a claim that it substantially affects a procedural right or runs afoul of another of the majority's formulations.[21]

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[21] Under 5 U.S.C. 557(c), for example, a party to a hearing is entitled to submit "proposed findings and conclusions" before a decision is rendered. Under the majority's analysis, a rule limiting a written filing to a fixed number of pages might be said to affect the right to file proposed findings and conclusions and to encode a substantive value judgment on the appropriate balance between that right and the agency's interest in efficient adjudication. In fact, in this case, the ATA specifically challenged a rule that obligated parties to offer their proposed findings orally, except in complex cases. App., *infra*, 83a-84a. It is impossible to determine whether such a rule would pass muster under the majority's analysis or, in terms of that analysis, to discern a line that would distinguish it from a page limit.

The express statutory exceptions to the notice-and-comment requirement serve the valuable purpose of obviating "lengthy administrative procedures" in circumstances where Congress has determined they are not essential. See *Philadelphia Citizens in Action* v. *Schweiker*, 669 F.2d 877, 881 (3d Cir. 1982). While many agencies voluntariiy engage in notice-and-comment rulemaking when issuing procedural rules (including the DOT and FAA when time permits, see 44 Fed. Reg. 11,044 (1979)), the flexibility afforded by the exception to the notice-and-comment requirement for procedural rules remains important to agencies in various circumstances. This case—in which the FAA was given the task of creating and implementing a major enforcement program and reporting to Congress within 18 months—illustrates the importance of the exception. The exceptions to the notice-and-comment requirement embody a legislative decision that agencies should have discretion to promulgate certain categories of rules without notice and comment; Congress's "explicit judgment * * * as to when administrative agencies may dispense with formal rulemaking procedures must be respected." 669 F.2d at 881.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1990

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* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 2, 1990 Decided April 13, 1990

As Amended April 27, 1990

No. 89-1195

AIR TRANSPORT ASSOCIATION OF AMERICA, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION; SAMUEL SKINNER, SECRETARY OF TRANSPORTATION; FEDERAL AVIATION ADMINISTRATION; AND JAMES B. BUSEY, ADMINISTRATOR, RESPONDENTS

On Petition for Review of an Order of the Federal Aviation Administration

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Before: MIKVA, EDWARDS and SILBERMAN, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Dissenting opinion filed by *Circuit Judge* SILBERMAN.

EDWARDS, *Circuit Judge*: The issue in this case is whether respondent governmental agencies (collectively "Federal Aviation Administration" or "FAA")

were obliged to engage in notice and comment procedures before promulgating a body of regulations governing the adjudication of administrative civil penalty actions. *See* 53 Fed. Reg. 34,646 (1988) (codified at 14 C.F.R. pt. 13) ("Penalty Rules" or "Rules"). The FAA issued the Penalty Rules pursuant to a temporary enabling statute intended to augment the agency's authority to enforce compliance with aviation safety standards. *See* 49 U.S.C. app. § 1475 (Supp. V 1987). Petitioner Air Transport Association of America ("Air Transport") contends that the FAA's failure to comply with the notice and comment requirements of the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 553 (1988), renders the Penalty Rules invalid. The FAA maintains that it was justified in dispensing with notice and comment under the "rules of agency organization, procedure, or practice" and "good cause" exceptions to section 553. *See id.* § 553(b)(A)-(B).

We grant the petition for review. It is well established that the exemption under section 553(b)~~(3)~~(A), for "rules of agency organization, procedure, or practice," does *not* apply to agency action that "substantially alter[s] the rights or interests of regulated" parties. *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1041 (D.C. Cir. 1987). The Penalty Rules fall outside the scope of the exception because they substantially affect civil penalty defendants' "right to avail [themselves] of an administrative adjudication." *National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90, 96 (D.D.C. 1967) (three-judge panel), *aff'd mem.*, 393 U.S. 18 (1968). Moreover, because we find that the time constraints of the enabling statute did not impose an insurmountable obstacle to complying with the applicable notice

and comment requirements of the APA, we also reject the FAA's reliance on the "good cause" exception under section 553(b)(B). Consequently, we hold that the Penalty Rules are invalid and that the FAA may not initiate new prosecutions until it has complied with the procedural requirements of the APA.

I. BACKGROUND

In December of 1987, Congress enacted a series of amendments to the Federal Aviation Act relating to civil penalties. *See* Pub. L. No. 100-223, § 204, 101 Stat. 1519 (codified in scattered sections of 49 U.S.C. app.). Among other things, these amendments raised to $10,000 the maximum penalty for a single violation of aviation safety standards, *see* 49 U.S.C. app. § 1471(a)(1) (Supp. V 1987), and established a "demonstration program" authorizing the FAA to prosecute and adjudicate administrative penalty actions involving less than $50,000, 49 U.S.C. app. § 1475 (Supp. V 1987).[1] Under the terms of the demonstration program, the FAA was granted the authority to assess administrative penalties for a two-year period beginning on December 30, 1987, *see id.* § 1475(d)(4), and was to report to Congress on the effectiveness of the program within eighteen months, *see* Pub. L. No. 100-223, § 204(i)(2), 101 Stat. 1521.

Congress' goal in enacting this legislation was to strengthen the enforcement powers of the Federal Aviation Administration. Before the 1987 amendments, the FAA could propose a maximum civil pen-

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[1] The Administrator, or his delegate, may assess a civil penalty for a violation arising under this chapter or a rule, regulation, or order issued thereunder, upon written notice and finding of violation by the Administrator.

Id. § 1475(a).

alty of only $1,000 per violation and had no enforcement authority of its own.[2] When an alleged violator disputed a penalty, the FAA was obliged to refer the case to the United States Attorney's office for prosecution in federal district court; relatively few such cases were prosecuted, however, because of competing work obligations facing U.S. Attorneys. *See* 133 CONG. REC. S15,294 (daily ed. Oct. 28, 1987) (statement of Sen. Wilson); 53 Fed. Reg. 34,646 (1988). Understandably, Congress did not view this as a particularly effective system for assuring compliance with aviation safety standards. By raising the maximum penalty and giving the FAA the power to prosecute penalty actions administratively, Congress sought to "close the holes in the FAA's safety net" and thereby "provide[] an incentive for airlines to ensure that [their safety] systems are maintained at the highest of standards." 133 CONG. REC. S15,294 (statement of Sen. Wilson).[3]

At the same time, however, Congress remained attentive to the adjudicative rights of civil penalty defendants. Congress provided that the FAA could assess a civil penalty "only after notice and opportunity for a hearing on the record in accordance with section

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[2] However, the FAA did have the authority to assess civil penalties of up to $10,000 for violations of the Hazardous Materials Transportation Act, 49 U.S.C. app. § 1809(a)(1) (1982), and to prosecute such violations administratively, *see* 49 C.F.R. § 13.16 (1988). The Penalty Rules govern administrative penalty actions under both the Federal Aviation Act and the Hazardous Materials Transportation Act. *See* 49 C.F.R. §§ 13.201(a)(2) (1989).

[3] Nonetheless, civil penalty actions may still be brought in federal district court, *see* 49 U.S.C. app. §§ 1471, 1487 (1982), which retains exclusive jurisdiction in civil penalty actions involving more than $50,000, *see id.* § 1475(c).

554 of [the APA]." 49 U.S.C. app. § 1475(d)(1). As the conference report accompanying section 1475 explained, the express incorporation of the APA's procedural protections was designed to achieve two purposes:

> First, the requirement is intended to advise the FAA of the appropriate level of procedural formality and attention to the rights of those assessed civil penalties under this demonstration program. Secondly, this requirement is intended to provide reasonable assurance to the potential subjects of such civil penalties that their due process rights are not compromised.

H.R. CONF. REP. No. 484, 100th Cong., 1st Sess. 81 (1987).

Approximately nine months after enactment of section 1475, the FAA promulgated the Penalty Rules. *See* 53 Fed. Reg. 34,646 (1988) (codified at 14 C.F.R. pt. 13). Effective immediately upon their issuance, the Penalty Rules established a schedule of civil penalties, including fines of up to $10,000 for violations of the safety standards of the Federal Aviation Act and related regulations. *See* 14 C.F.R. § 13.16(a)(3) (1989). The Penalty Rules also established a comprehensive adjudicatory scheme providing for formal notice, settlement procedures, discovery, an adversary hearing before an ALJ and an administrative appeal. *See id.* §§ 13.201-13.235. In explaining why it dispensed with prepromulgation notice and comment, the FAA emphasized the procedural character of the Penalty Rules and the time constraints of section 1475. *See* 53 Fed. Reg. 34,646, 34,652-53. The FAA did respond to *post*promulgation comments but declined to make any amendments to the Rules. *See* 54 Fed. Reg. 11,914 (1989).

Congressional oversight of the section 1475 demonstration program is ongoing. In its report to Congress, the FAA vigorously defended the Penalty Rules. *See* Respondent's Supplemental Addendum at 1-54. Others, including commercial and noncommercial aviators and the Administrative Law Section of the American Bar Association were less enthusiastic, criticizing what they perceived to be the Rules' systematic procedural bias in favor of the FAA. *See* Petitioner's Supplemental Addendum 2-40. In response to the controversy, Congress declined FAA's request to extend section 1475 by two years, and instead extended the statute by only four months. *See* Pub. L. No. 101-236, § 1, 103 Stat. 2060 (1989). Supporters of this legislation emphasized that extension "should not be viewed as approval of the FAA's procedures" but only "as a way to preserve the status quo while" Congress "review[s] . . . how the major concerns coming from every segment of the aviation community are going to be resolved." 135 CONG. REC. H8917 (daily ed. Nov. 17, 1989) (statement of Rep. Hammerschmidt); *id.* (statement of Rep. Valentine). Indeed, on March 6, 1990—approximately one month after this case was argued—the FAA issued a notice of proposed rulemaking announcing the agency's intention to amend some of the individual Rules that have provoked the most controversy. *See* 55 Fed. Reg. 7980 (1990).

In its petition for review, Air Transport raises two challenges to the Penalty Rules.[4] First, it attacks the procedural adequacy of the Rules, arguing that

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[4] Air Transport petitioned directly to this court pursuant to 49 U.S.C. app. § 1486 (1982). *See generally Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912, 915-16 (D.C. Cir. 1973).

the FAA was obliged by section 553 of the APA to permit notice and comment *before* the Rules became effective. Second, Air Transport attacks the substantive adequacy of the Rules on the ground that they establish adjudicatory procedures inconsistent with section 554 of the APA. In a previous order, we deferred consideration of the FAA's motion to dismiss the petition on ripeness grounds and directed the parties to address this issue in their briefs on the merits. We now find that Air Transport's *procedural* challenge to the Penalty Rules is ripe for review and grant the petition on that ground.[5]

II. Analysis

A. *Ripeness*

The FAA contends that, under the ripeness doctrine, *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), this court should defer review of the Penalty Rules until after the agency has had an opportunity to apply the Rules in the concrete settings of administrative adjudications. *Compare Webb v. Department of Health and Human Servs.*, 696 F.2d 101, 107-08 (D.C. Cir. 1982) (fact-specific challenge to regulation not ripe before regulation is applied) *with Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 92-93 (D.C. Cir. 1986) (purely legal challenge is ripe before application). In other words, the agency claims that Air Transport's preenforcement challenge to the substance of the Penalty Rules should be barred as unripe. We need not reach that issue, however, because Air Transport's petition for review raises *two* issues: (1) the claim that the

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[5] Consequently, we do not reach petitioner's challenge to the substance of the Penalty Rules. We also express no opinion on whether *that* challenge presents issues ripe for review.

agency was required to use notice and comment rulemaking in promulgating the Penalty Rules (the "procedural" challenge), and (2) the claim that, whether or not notice and comment was required, certain of the Penalty Rules are unlawful as promulgated (the "substantive" challenge). Because we find merit in the procedural challenge, we need not address whether Air Transport's substantive challenge is ripe.

As FAA counsel acknowledged at oral argument, the first of the two claims, the procedural challenge, is clearly ripe for review. In applying the ripeness doctrine, we ask first whether the challenge in question is "purely legal"; if so, it is presumptively reviewable. *See, e.g., Better Gov't Ass'n*, 780 F.2d at 92. Next "we determine whether the court or the agency would benefit from the postponement of review until the agency action or policy in question has assumed either a final or more concrete form." *Id.* Only if these inquiries raise significant "doubts about the fitness of the issue for judicial resolution" do we look to the "hardship" prong of the ripeness test, considering whether the effect of the challenged action on the petitioner's primary conduct outweighs the institutional interests in deferring review. *Consolidated Rail Corp. v. United States*, No. 89-1074, slip op. at 5 (D.C. Cir. Feb. 16, 1990); *see Askins v. District of Columbia*, 877 F.2d 94, 97-98 (D.C. Cir. 1989).

Applying these criteria, we have no trouble concluding that Air Transport's procedural challenge to the Penalty Rules is ripe. The challenge is purely legal; whether the Penalty Rules are subject to the APA's notice and comment procedures can be determined solely from the text, the legislative history and the judicial interpretations of section 553. *See Better Gov't Ass'n*, 780 F.2d at 92. Furthermore, there are

no judicial or agency interests militating in favor of deferring review. Neither the application of the Penalty Rules nor even the possible amendment of individual Rules will have any bearing on whether the Rules as a whole were unlawfully promulgated.[6] And until that question is settled, it will provide a possible basis for review in *every* penalty action adjudicated by the FAA.

Thus, "in light of our conclusion that this matter is clearly fit to be heard, we need not consider whether petitioners would suffer any hardship from our postponing its resolution." *Consolidated Rail Corp., supra,* slip op. at 6. Accordingly, we hold that petitioner's procedural challenge is ripe for review.

B. *The Merits*

Section 553 of the APA obliges an agency to provide notice and an opportunity to comment before promulgating a final rule.[7] No question exists that

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[6] The FAA does not contend that the possible expiration of section 1475 affects the ripeness of the petition for review. No reason exists to believe that Congress will permit the FAA's civil penalty program to lapse; and, in any event, we cannot predicate our jurisdiction on speculations as to what actions Congress may or may not take.

[7] Section 553 provides in relevant part:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and

[Continued]

the Penalty Rules fall within the scope of the APA's rulemaking provisions. *See* 5 U.S.C. § 551(4)-(5) (1988). Nonetheless, the FAA maintains that the Penalty Rules were exempt from the notice and comment requirements for two, independent reasons: first, because they are "rules of agency organization, procedure, or practice," *id.* § 553(b)(A); and second, because the time constraints of section 1475 gave the FAA "good cause" to find that prepromulgation notice and comment would be "impracticable, unnecessary, or contrary to the public interest." *id.* § 553(b)(B). The FAA also argues that its entertainment of *post*promulgation comments cured any violation of section 553.

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[7] [Continued]

> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice or hearing is required by statute, this subsection does not apply—
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> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

Section 553's notice and comment requirements are essential to the scheme of administrative governance established by the APA. These procedures reflect Congress' "judgment that . . . informed administrative decisionmaking require[s] that agency decisions be made only after affording interested persons" an opportunity to communicate their views to the agency. *Chrysler Corp v. Brown*, 441 U.S. 281, 316 (1979). Equally important, by mandating "openness, explanation, and participatory democracy" in the rulemaking process, these procedures assure the legitimacy of administrative norms. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978). For these reasons, we have consistently afforded a narrow cast to the exceptions to section 553, permitting an agency to forgo notice and comment only when the subject matter or the circumstances of the rulemaking divest the public of any legitimate stake in influencing the outcome. *See, e.g., Batterton v. Marshall*, 648 F.2d 694, 704 (D.C. Cir. 1980); *American Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980). In the instant case, because the Penalty Rules substantially affected civil penalty defendants' right to avail themselves of an administrative adjudication, we cannot accept the FAA's contention that the Rules could be promulgated without notice and comment.

1. *"Rules of Agency Organization, Procedure, or Practice"*

The FAA argues that the Penalty Rules are exempt as "rules of agency organization, procedure, or practice" because they establish "procedures" for adjudicating civil penalty actions. According to the FAA, it would have been obliged to permit public

participation in the rulemaking process only if the Penalty Rules affected aviators' "substantive" obligations under the Federal Aviation Act. We find this analysis unpersuasive.

Our cases construing section 553(b)(A) have long emphasized that a rule does not fall within the scope of the exception merely because it is capable of bearing the label "procedural." *See, e.g., Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989) (*per curiam*). In *Reeder*, we examined a body of rules governing the submission of "counterproposals" to the allotment of FM radio frequencies by the Federal Communications Commission. Although the rules purported merely to define the procedures for the submission of counterproposals, we recognized that these procedures in fact foreclosed agency consideration of counterproposals based on the upgrading of existing FM stations. *See id.* at 1305. Because the agency previously *did* permit applicants to submit counterproposals based on upgrading plans, we held that the agency should have engaged in notice and comment before depriving aplicants' of this right. *See id.; see also Batterton*, 648 F.2d at 707-08 (procedures affecting entitlement to federal grants not exempt); *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974) (procedures affecting parole determinations).

Rather than focus on whether a particular rule is "procedural" or "substantive," these decisions employ a functional analysis. Section 553(b)(A) has been described as essentially a "housekeeping" measure, *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979), "[t]he distinctive purpose of . . . [which] is to ensure 'that agencies retain latitude in organizing their *internal* operations,'" *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (quoting *Batterton*, 648 F.2d at 707) (emphasis added).

Where nominally "procedural" rules "encode[] a substantive value judgment" or "substantially alter the rights or interests of regulated" parties, however, the rules must be preceded by notice and comment. *Id.* at 1047, 1041.

The Penalty Rules fall outside the scope of section 553(b)(A) because they substantially affect a civil penalty defendant's *right to an administrative adjudication.* Under both the due process clause, *see Lipke v. Lederer*, 259 U.S. 557, 562 (1922), and the APA, *see* 5 U.S.C. §§ 554, 556 (1988), a party has a right to notice and a hearing before being forced to pay a monetary penalty. Congress expressly directed the FAA to incorporate these rights into its civil penalty program. *See* 49 U.S.C. app. § 1475(d)(1); H.R. CONF. REP. No. 484, 100th Cong., 1st Sess. 81 (1987). In implementing this mandate, the FAA made discretionary—indeed, in many cases, highly contentious—choices concerning what process civil penalty defendants are due. Each of these choices "encode[d] a substantive value judgment," *American Hosp. Ass'n*, 834 F.2d at 1047, on the appropriate balance between a defendant's *right* to adjudicatory procedures and the agency's interest in efficient prosecution.[8] The FAA was no less obliged to engage in notice and comment before taking action affecting these adjudicatory rights than it would have been had it taken action affecting aviators' "substantive" obligations under the Federal Aviation Act. *See, e.g., Na-*

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[8] In noting that the FAA made discretionary choices determining the *specific form* of civil penalty defendants' adjudicatory rights, we do not, of course, suggest that the choices made *violated* those rights. Section 553 stands for the proposition that interested parties have a right to influence agency decisionmaking even when the decisions made are substantively lawful.

tional Ass'n v. Schweicker, 690 F.2d 932, 949 (D.C. Cir. 1982) (notice and comment required for rules "eliminating the qualified right" to present reimbursement claims to agency secretary rather than intermediary), *cert. denied*, 459 U.S. 1205 (1983); *Brown Express, Inc. v. United States*, 607 F.2d 695, 702-03 (5th Cir. 1979) (notice and comment required for rules eliminating notice of award of temporary carrier licenses).

Indeed, this is the teaching of the seminal decision in *National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90 (D.D.C. 1968) (three-judge panel), *aff'd mem.*, 393 U.S. 18 (1968). In *National Motor Freight*, the court [9] reviewed a body of Interstate Commerce Commission rules establishing a scheme for the administrative adjudication of carrier overcharge claims. Rejecting the claim that the rules merely established procedures for implementing substantive statutory rights, the court held that the agency's decision to establish "[a] right to avail oneself of an administrative adjudication" was itself one that the APA required to be open to public participation. *Id.* at 95-96. *National Motor Freight* was summarily affirmed by the Supreme Court, and remains binding precedent. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.29, at 589 (2d ed. 1978) (decribing *National Motor Freight* as "[t]he most authoritative decision" on the scope of section 553(b)(A)). In our view, it is controlling in the case before us.

The cases cited by the FAA do not suggest a contrary conclusion. The FAA puts its primary emphasis on *American Hospital Association*. At issue in that

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[9] On the three-judge panel were then Circuit Judge Burger, Circuit Judge McGowan and District Judge Sirica. Judge McGowan wrote the opinion for the court.

case were a series of agency directives and manuals defining the "enforcement strategy" of review boards assigned to investigate Medicare reimbursement claims by hospitals. *See* 834 F.2d at 1049-52. We held that these materials were covered by section 553 (b)(A) because we recognized that the public has no legitimate interest in influencing an agency's "discretionary deployment of enforcement resources," *id.* at 1057 n.4—a classic "internal" matter, essential to how an agency constitutes itself, *cf. Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). Nothing in *American Hospital Association* detracts from the principle that the public *does* have a legitimate interest in participating in agency decisions affecting statutory and constitutional rights "to avail oneself of an administrative adjudication." *National Motor Freight*, 268 F. Supp. at 96.[10]

Also inapposite are various decisions in which we have applied section 553(b)(A) to rules that regulate such matters as the timing of applications for benefits, *see, e.g., Lamoille Valley R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983); *Ranger v. FCC*, 294 F.2d 240, 243-44 (D.C. Cir. 1961), or the timing of the agency's processing of such applications, *Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629, 637-38 (D.C. Cir. 1984). The rules at issue in these cases did affect "the manner in which the parties present themselves or their viewpoints to the agency," *Batterton*, 648 F.2d at 707, but they did *not* affect any component of a party's statutory or constitutional right to avail himself of an administrative adjudication. They

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[10] Indeed, in *American Hospital Association*, the bulk "of regulations . . . regarding [agency review board] *procedures*" *had* been subject to notice and comment rulemaking and were therefore not being challenged. 834 F.2d at 1043 (emphasis added).

were all cases, in short, in which "the need for public participation" in the rulemaking process was "too small to warrant it." *Id.* at 704.[11] The Penalty Rules, in contrast, affect the entire range of adjudicatory rights guaranteed by the due process clause, the APA and section 1475(d)(1)—matters far too important to be withdrawn from public deliberation. *See National Motor Freight*, 268 F. Supp. at 96-97.[12]

In criticizing our reliance on *National Motor Freight*, the dissent argues that agency action that is

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[11] In characterizing the principle underlying these decisions, we have sometimes spoken broadly, describing section 553(b)(A) as exempting the "technical regulation of the form of agency action and proceedings." *Pickus*, 507 F.2d at 1113. But we have never suggested, much less held, that section 553(b)(A) exempts measures that regulate the form of agency proceedings when these measures also affect a statutory or constitutional right to administrative adjudication. *Cf. id.* ("category" of "technical regulation of the form of agency action and proceedings" does not "include any action which goes beyond formality and substantially affects the rights of those over whom the agency exercises authority").

[12] Of course, not *all* of the procedures established by the Penalty Rules touch on civil penalty defendants' rights to adjudication. We reject the FAA's contention, however, that we should identify *which* individual Rules fall within the scope of section 553(b)(A) and invalidate only those. At a minimum, the FAA was obliged to engage in notice and comment before promulgating the Rules implementing the APA's procedures for formal adjudication, *see* 5 U.S.C. §§ 554, 556-557 (1988), and deprived of these particular Rules, the FAA's penalty program clearly cannot function. Moreover, the FAA promulgated the Penalty Rules as an integrated whole. Because identifying the combination of procedures that best reconciles the needs of the agency and the rights of civil penalty defendants involves discretionary lawmaking powers delegated by Congress *to the FAA*, it would be inappropriate for us selectively to invalidate individual Rules while leaving the FAA's adjudicatory scheme intact. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

expressly exempt under the APA is not subject to notice and comment rulemaking simply because it has a "substantial impact" on regulated parties. We agree with this assertion, but it is irrelevant because it begs the question whether the Penalty Rules are included within the exemption of section 553(b)(A). We rely on *National Motor Freight* not to show that the Penalty Rules have a "substantial impact" on aviators, but to show that rules affecting *the right to avail oneself of an administrative adjudication* are *not* within the express terms of section 553(b)(A). *No* case in this circuit has ever suggested otherwise.

The dissent also contends that we have "obliterated" the distinction between substance and procedure. But, as the case law clearly illustrates, there is no such "distinction" to obliterate for purposes of section 553(b)(A). The dissent refuses to come to terms with the precedent characterizing this exception to notice and comment rulemaking as a mere "housekeeping" measure, *Brown*, 441 U.S. at 310, applicable to rules " 'organizing [agencies'] *internal* operations.' " *American Hosp. Ass'n*, 834 F.2d at 1047 (quoting *Batterton*, 648 F.2d at 707) (emphasis added). The dissent's infusion of a rigid "procedure"-"substance" distinction is not only inconsistent with our precedent, *see, e.g., Reeder*, 865 F.2d at 1305; *Batterton*, 648 F.2d at 707-08, but is also inconsistent with the statutory text. Section 553(b)(A) does not exempt "rules of procedure" *per se*, but rather "rules of *agency organization*, procedure, or practice." The dissent's exclusive focus on the word "procedure" thus violates the well established principle of construction "that 'words grouped in a list should be given related meaning.' " *Dole v. United Steelworkers*, 110 S. Ct.

929, 935 (1990) (quoting *Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989)).[13]

In sum, the FAA's contention that it did not affect the "substantive" obligations of aviators under the Federal Aviation Act is irrelevant. "The characterizations 'substantive' and 'procedural'—no more here than elsewhere in the law—do not guide inexorably to the right result, nor do they really advance the inquiry very far." *National Motor Freight*, 268 F. Supp. at 96. In using the terms "rules of agency organization, procedure, or practice," Congress intended to distinguish not between rules affecting different *classes of rights*—"substantive" and "procedural"—but rather to distinguish between rules affecting different *subject matters*—"the rights or interests of regulated" parties, *American Hosp. Ass'n*, 834 F.2d at 1041, and agencies' " 'internal operations,' " *id.* at 1047 (quoting *Batterton*, 648 F.2d at 707). Because the Penalty Rules substantially affect civil penalty defendants' "right to avail [themselves] of an administrative adjudication," members of the aviation community had a legitimate interest in participating in

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[13] The dissent's suggestion that we have disregarded *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), raises a false issue, for it assumes the answer to the question posed. In *Vermont Yankee*, the Supreme Court held that reviewing courts cannot impose on an agency procedural requirements not found in the APA. *See id.* at 549. Section 553 of the APA *expressly* directs agencies to engage in notice and comment rulemaking; the issue in this case is whether the FAA had any ground to disregard this procedural obligation. Because the dissent's use of *Vermont Yankee presupposes*, incorrectly, in our view, that the Penalty Rules fall within the exception in section 553(b)(A), the dissent's reliance on the case adds nothing to the position sought to be advanced.

the rulemaking process. *National Motor Freight*, 268 F. Supp. at 96.

2. *"Good Cause"*

We also disagree that the two-year duration of section 1475's demonstration program furnished the FAA with "good cause" to dispense with notice and comment procedures. Like the other exceptions, the good cause exception is to "be narrowly construed and only reluctantly countenanced." *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). In particular, we have explained that statutory time limits do *not* ordinarily excuse compliance with the APA's procedural requirements. In *New Jersey v. EPA*, we reviewed a set of regulations issued pursuant to a six-month time limit. Adopting the reasoning of two of our sister circuits, we held that the statutory deadline did not constitute good cause to forgo notice and comment absent " 'any express indication' " by Congress to this effect. *Id.* at 1043 (quoting *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 380 (3d Cir. 1979)). *See also Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981) (" '[T]he mere existence of deadlines for agency action . . . [can] not in itself constitute good cause for a § 553(b)(B) exception.' " (quoting *United States Steel Corp. v. United States EPA*, 595 F.2d 207, 213 (5th Cir.), *reh'g granted in part on other grounds*, 598 F.2d 915 (5th Cir. 1975)).

New Jersey v. EPA is controlling here. Congress did not express an intention to relieve the FAA of the legal obligation to engage in notice and comment procedures before promulation of the Penalty Rules. Indeed, section 1475 did not even *set* a formal deadline for implementation of the agency's authority to assess

civil penalties. It is true that the two-year duration of the "demonstration program," along with the associated eighteen-month reporting deadline, *see* Pub. L. No. 100-223, § 204(i)(2), 101 Stat. 1521, encouraged the FAA to act with reasonable dispatch. But we believe that the FAA, using expedited notice and comment procedures if necessary, could have realized this objective short of disregarding its obligations under the APA. *Cf. Phillips Petroleum Co. v. United States EPA*, 803 F.2d 545, 559 (10th Cir. 1986) (noting broad discretion of agency to determine length of comment period).[14]

Finally, the FAA is foreclosed from relying on the good cause exception by its own delay in promulgating the Penalty Rules. The agency waited almost nine months before taking action to implement its authority under section 1475. At oral argument, counsel for the FAA conceded that the delay was largely a product of the agency's decision to attend to other obligations. We are hardly in a position to second guess the FAA's choices in determining institutional priorities. But insofar as the FAA's own failure to act materially contributed to its perceived deadline pressure, the agency cannot now invoke the need for expeditious action as "good cause" to avoid the obligations of section 553(b). *See National Ass'n of Farmworkers v. Marshall*, 628 F.2d 604, 622 (D.C. Cir. 1980).

3. *Postpromulgation Comment*

Finally, we reject the FAA's contention that its response to comments *after* promulgation of the Penalty Rules cured any noncompliance with section 553.

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[14] We note in this regard that the FAA has adopted an accelerated twenty-four-day comment period in its pending notice of proposed rulemaking. *See* 55 Fed. Reg. 7980.

Section 553 provides "that notice and an opportunity for comment are to *precede* rule-making." *New Jersey v. EPA*, 626 F.2d at 1050. We strictly enforce this requirement because we recognize that an agency is not likely to be receptive to suggested changes once the agency "put[s] its credibility on the line in the form of 'final' rules. People naturally tend to be more close-minded and defensive once they have made a 'final' determination." *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978). Although we have suggested that there might be circumstances in which "defects in an original notice [could] be cured by an adequate later notice" and opportunity to comment, we have emphasized that we could reach such a conclusion only upon a compelling showing that "the agency's mind remain[ed] open enough at the later stage." *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988); *see Reeder*, 865 F.2d at 1034; *see also New Jersey v. EPA*, 626 F.2d at 1050 (noting "the presumption that *post hoc* comment was not contemplated by the APA and is generally not consonant with it").

The FAA has not come close to overcoming the presumption of closed-mindedness in this case. It made no changes in the Penalty Rules in response to public comments. Nor did the language of FAA's published replies suggest that the agency had afforded the comments particularly searching consideration. *See McLouth Steel Prods. Corp.*, 838 F.2d at 1323.

Under the circumstances, then, we cannot discount the possibility that, had the FAA entertained comments *before* the Penalty Rules became final, it "might have decided [on] a different accommodation" of the agency's enforcement needs and civil penalty defendants' procedural rights. *Brown*, 441 U.S. at 316. Indeed, if the FAA had entertained prepromul-

gation comments and taken those comments seriously, it might very well have averted the public outcry underlying the agency's pending notice of proposed rulemaking.

C. *Remedy*

Having determined that the FAA promulgated the Penalty Rules in violation of the APA's notice and comment requirements, we must next consider the appropriate remedy. Ordinarily, when agency rules have been invalidated, the agency may not rely on those rules until they have been repromulgated in accordance with the APA. *See, e.g., Reeder*, 865 F.2d at 1306. We find such a disposition appropriate in this case; therefore, we hold that the FAA may not initiate new prosecutions under the Penalty Rules unless and until they are repromulgated. Insofar as the FAA's pending notice of proposed rulemaking seeks public comment on the individual Rules that the agency intends to amend, the agency may rely on the outcome of that rulemaking as a partial fulfillment of this mandate.

This disposition, however, does not address the status of pending civil penalty actions. Counsel informed us that as of the date on which this case was argued, the FAA had initiated some 4,800 prosecutions, only a handful of which had progressed to the stage of an administrative hearing. The FAA remains free, of course, to refer these cases to the United States Attorney for prosecution in district court. *See* 49 U.S.C. app. §§ 1471(a)(1), 1487(a), (b). Nonetheless, we remain sympathetic to the FAA's concern that leaving the agency with solely this option would oblige it to forfeit the considerable investment it has made in prosecuting these cases and

would frustrate Congress' intent to tighten enforcement by providing an administrative forum for their adjudication.

So long as it "act[s] within the bounds of the statute and without intruding upon the administrative province," the court sitting in review of an administrative agency "may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939); *accord Indiana & Michigan Elec. Co. v. FPC*, 502 F.2d 336, 346 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975). In the past, we have employed our broad remedial powers to minimize disruption of congressional and administrative objectives when invalidating a rule promulgated in violation of the APA's notice and comment procedures. *See, e.g., Rodway v. United States Dep't of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975) (permitting agency to continue reliance on procedurally defective regulations implementing food stamp program pending new rulemaking).

We believe that the exercise of our equitable remedial powers is appropriate in this case as well. Consequently, although the FAA may not initiate *new* prosecutions under the Penalty Rules, we hold that the FAA is free to hold *pending* actions in abeyance while it engages in further rulemaking. If and when the FAA promulgates a final rule for adjudication of administrative penalty actions, it may then resume prosecution of these cases. A defendant in such a case will also be free to raise the defense that the FAA could not have successfully prosecuted him but for the agency's reliance on some aspect of the Penalty Rules abandoned in the new scheme. Finally, we take no position on whether parties whose cases have reached a *final* determination under the Penalty Rules

may not raise the procedural invalidity of the Rules as a ground for seeking review.

III. Conclusion

An agency may dispense with the notice and comment requirements of section 553 "only where the need for public participation is overcome by good cause to suspend it, or where the need is too small to warrant it." *Batterton*, 648 F.2d at 704 (footnote omitted). Neither of these conditions obtains in this case. The FAA did not have good cause to forgo notice and comment procedures, for nothing in section 1475 either excused or mandated noncompliance with section 553. Nor was this a case in which the need for public participation was "too small to warrant it"; civil penalty defendants have a legitimate interest in influencing agency action affecting their statutory and constitutional "right to avail [themselves] of an administrative adjudication." *National Motor Freight*, 268 F. Supp. at 96. We therefore grant the petition for review and order the FAA not to initiate further prosecutions under the Penalty Rules until the agency has engaged in further rulemaking in accord with section 553. Nonetheless, pursuant to our remedial powers, we hold that the FAA is free to hold pending cases in abeyance and resume prosecution upon the repromulgation of a scheme for adjudicating administrative civil penalty actions under section 1475.

It is so ordered.

SILBERMAN, *Circuit Judge, dissenting*: I quite agree with the majority that the question whether the FAA was obliged to issue the proposed rules for notice and comment is ripe,[1] but I disagree with the majority's answer to the question because I think the rules fall, by ample measure, within the "procedural" exemption of section 553(b)(A), which exempts from notice and comment "rules of agency organization, procedure, or practice." To be sure, the rules in this case could as well be described as rules of "practice" (covering the practice of the parties and attorneys before the FAA) and also in some respects rules of "agency organization" (dealing with the interrelationship between the administrative law judges and the Administrator). I use the term "procedure" here to cover all three concepts.

Lines between substance and procedure in various areas of the law are difficult to draw and therefore often perplex scholars and judges. But Congress, when it passed the Administrative Procedure Act, made that difference critical, and we are therefore obliged to implement a viable distinction between "procedural" rules and those that are substantive. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979) ("The central distinction among agency regulations found in the APA is between 'substantive rules' on the one hand and 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice' on the other."); *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989); *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987); *Neighborhood TV Co., Inc. v. FCC*, 742 F.2d

[1] Although I do not believe petitioner's challenge to the fairness of the rules is ripe, there is no point in discussing that issue in light of the majority's disposition.

629, 636-37 (D.C. Cir. 1984); *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983); *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980). The majority opinion, in effect, abandons the effort, finding in *Reeder*, *American Hospital Ass'n* and *Batterton* a disposition to challenge the Supreme Court's *Chrysler Corp.* analysis that I do not discern in those cases—or in any other. Accordingly, it will be impossible for any agency general counsel, in the future, safely to advise agency heads that a given set of proposed rules are procedural and do not have to be published for comment. Therefore, I dissent.

If we assume a spectrum of rules running from the most substantive to the most procedural, I would describe the former as those that regulate "primary conduct" in the way that term is used in *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967), and the latter are those furthest away from primary conduct. In other words, if a given regulation purports to direct, control, or condition the behavior of those institutions or individuals subject to regulation by the authorizing statute it is not procedural, it is substantive. At the other end of the spectrum are those rules, such as the ones before us in this case, which deal with enforcement or adjudication of claims of violations of the substantive norm but which do not *purport* to affect the substantive norm. These kinds of rules are, in my view, clearly procedural.

Rules are no less procedural because they are thought to be important or affect outcomes. Congress did not state, when it passed the APA, that all but insignificant rules must be put out for notice and comment.[2] And to say, as does the majority, that the

[2] The majority erroneously quotes *Chrysler Corp.* as referring to the procedural exemption as a "mere 'housekeeping'

rules are covered by section 553's notice and comment requirement because they "substantially affect a civil defendant's *right to an administrative adjudication*," Maj. Op. at 12 (emphasis in original), is, I respectfully submit, circular reasoning. It assumes the conclusion by describing petitioner's interest in the agency's adjudicatory procedures as if it were a substantive right. It also implicitly suggests that petitioner is correct on the merits in claiming the agency's adjudicatory procedures are illegal. In determining whether particular rules must be put out for comment, surely the APA does not contemplate that a reviewing court would be influenced by whether or not it thought procedural rules were illegal. If, as argued by petitioner, the rules violate its rather ill-defined notion of administrative due process (petitioner's primary claim on the merits seems to be that the rules offend the views of the American Bar Association) or even constitutional due process, that is an entirely separate matter which can be raised in a concrete setting.

Admittedly, not all our cases fit precisely along the continuum I described above. When an agency, rather than publishing rules which define a substantive norm to which regulated groups must conform or which flesh out enforcement procedures to effectuate such compliance, instead adopts rules dealing with the award of *benefits*, a slightly different but similar

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measure." *See* Maj. Op. at 15. In fact *Chrysler Corp.* characterized *5 U.S.C.* § *301*—the provision authorizing executive department heads to prescribe regulations for the governing of their departments—and not the APA procedural exemption as a "housekeeping statute." *See Chrysler Corp.*, 441 U.S. at 309-10. The Court then compared § 301 to the APA exemption, indicating that the procedural exemption *at least* includes day to day internal government business.

analysis is used to distinguish substantive from procedural rules. Sometimes the Government's prospective award of benefits is actually designed, in part, to affect primary conduct—such as the standards used to determine whether to renew a broadcast license or the criteria employed to determine eligibility for unemployment insurance. But typically, benefits are bestowed in accordance with preexisting qualifications or status. In those circumstances, it cannot be said that the rules seek to condition primary conduct. We still think of such rules as substantive because defining eligibility for a benefit program is the very essence of the program. It is in this context that in *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980), we said that substantive rules are those that affect the "rights and interests of parties." *See id.* at 707. In *Batterton*, Maryland challenged the Department of Labor's adoption of a new method of calculating local unemployment rates, which in turn determined the amount of CETA job training funds each state and locality would receive. We categorized those new rules as substantive because they altered the criteria by which Government benefits would be distributed rather than simply change the manner in which claimants for benefits communicated to the agency the nature of their substantive claim. *See id.* at 707-08. Similarly, in *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989), a radio station objected to the FCC adoption of rules governing counterproposals to the agency's allotment of new FM channels throughout the United States. We decided that the procedural exemption was inapplicable because the FCC had altered its decisionmaking criteria for new station allotments. *See id.* at 1304-05.

In contrast, in *Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629 (D.C. Cir. 1984), we concluded that

FCC rules that froze contested applications for "translators" (devices which amplify and rebroadcast television signals) and then processed rural applications before urban ones were procedural because the rules did not alter the standards by which those applications would be judged. *See id.* at 637-38. We also pointed out that our earlier decisions in *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963), and *Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961), found the challenged rule exempted from the notice and comment requirements precisely because the FCC rules did not regulate the radio stations' right to broadcast its signals at a particular station. *See Neighborhood TV*, 742 F.2d at 638.

Of course, procedure impacts on outcomes and thus can virtually always be described as affecting substance, but to pursue that line of analysis results in the obliteration of the distinction that Congress demanded. We avoided that snare only recently in *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987), where we held, over a strong dissent in many respects redolent of the majority opinion here, that HHS rules that set forth the enforcement priorities for peer review organizations (acting as agents to ensure medically reasonable and necessary hospital health care), as well as some adjudicatory procedures similar to those contained in the rules before us, did not have to be published for comment. Although it was argued that the procedures would affect hospital behavior by discouraging activity in the zone of an enforcement priority, we nevertheless held that the rules did not "encode[] a substantive value judgment or put[] a stamp of approval or disapproval on a given type of behavior." *Id.* at 1047. We recognized that hospital costs would be affected by the enforcement scheme, but that was not enough to bring

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the rules out of the procedural safe harbor. *See id.* at 1051. The case at bar involves rules that are, *a fortiori*, procedural because, unlike in *American Hospital Ass'n*, it is not even argued here that primary behavior—the safety efforts of the airlines—is even affected by the adjudictory rules.

Deviating from our previous and recent emphasis on primary conduct, the majority asserts that a proposed rule that *allegedly* infringes on "the right to avail oneself of an administrative adjudication" is "substantive." *See* Maj. Op. at 13. But the quoted language comes from an old and now discredited district court case, *National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90 (D.D.C. 1967), *aff'd mem.*, 393 U.S. 18 (1968). The Supreme Court summarily affirmed the judgment of the district court in *National Motor Freight*, and therefore we are not bound by the district court's reasoning. *See Anderson v. Celebrezze*, 460 U.S. 780, 785 n.5 (1983) ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment."); *Illinois Election Bd. v. Socialist Workers Party*, 440 U.S. 173, 782-83 (1979). We have specifically disapproved of *National Motor Fright*'s "substantial impact" analysis, moreover, because of the Supreme Court's command in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), to avoid engrafting additional procedures on agency action beyond those required by the APA. *See Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982) ("Simply because agency action has substantial impact does not mean it is subject to notice and comment if it is otherwise expressly exempt under the APA.").[3]

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[3] Even if *National Motor Freight* were still good law and binding on us, our case is arguably distinguishable because

It might be thought that there is something vaguely underhanded about an agency publishing important rules without an opportunity for those affected to comment. And lawyers and judges tend to prefer, on the margin, added procedure. But as *Cabais* makes clear, we have been admonished somewhat dramatically by *Vermont Yankee* to not add more procedure to the APA than Congress required. I am afraid the majority opinion by obliterating the distinction between substance and procedure in section 553 does just that.

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the only issue before us is the specific content of FAA adjudicative procedures and not whether such a remedial avenue exists at all. In *National Motor Freight*, freight carriers challenged an ICC plan of administrative adjudication of alleged carrier overcharges. Congress had explicitly authorized only judicial remedies to recover excessive rates. In the absence of such authority, the district court concluded that the right to an administrative route to reparations itself was a significant determination by the Commission that granted shippers an easier path to recover excess payments. *See National Motor Freight*, 268 F. Supp. at 95-96. Thus, the court decided that the provision of a *new remedy* was a new right or interest afforded to shippers. In contrast, Congress specifically empowered the FAA to adopt rules to adjudicate civil penalties. *See* 49 U.S.C. app. § 1475(d)(1). After *National Motor Freight*, the courts that adopted the "substantial impact" reasoning found the requisite impact when the agency created *new* rights and obligations. *See British Caledonian Airways, Ltd. v. CAB*, 584 F.2d 982, 989 (D.C. Cir. 1978).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1195

AIR TRANSPORT ASSOCIATION OF AMERICA,
PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, RESPONDENT

Before: Mikva, Edwards and Silberman, Circuit Judges

ORDER

[Filed Jun. 18, 1990]

Upon consideration of respondents' petition for rehearing, filed May 29, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Silberman would grant the Petition For Rehearing.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1195

AIR TRANSPORT ASSOCIATION OF AMERICA,
PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, RESPONDENT

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle and Thomas, Circuit Judges

ORDER

[Filed Jun. 18, 1990]

Respondents' Suggestion For Rehearing *En Banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Silberman, Williams, D. H. Ginsburg, Sentelle and Thomas would grant the suggestion for rehearing *en banc*.

APPENDIX D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 13

[Docket No. 25690; Amdt. No. 13-18]

Rules of Practice for FAA Civil Penalty Actions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: This final rule sets forth revised initiation procedures and new rules of practice in FAA civil penalty actions. The rules are needed to provide detailed procedures for on-the-record hearings required in civil penalty actions by legislation recently passed by Congress. The rules are intended to provide an appropriate level of procedural formality in civil penalty proceedings, focus attention on the rights of individuals subject to civil penalties, and ensure that due process is afforded those individuals during the civil penalty enforcement process.

DATES: The final rule is effective on September 7, 1988. Comments must be received on or before November 7, 1988.

* * * * *

SUPPLEMENTARY INFORMATION:

Comments Invited

The new rules contained in this amendment are purely procedural rules to govern on-the-record hear-

ings required by statute. The amendments to the current regulations are required so that the regulations will conform to existing and recently enacted statutory authority. Because both the procedural rules and revised regulations are required to implement the recently enacted legislative amendment to the Federal Aviation Act of 1958, they are being adopted without notice and prior public comment. However, the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979) provide that to the maximum extent possible, Department of Transportation (DOT) operating administrations should provide an opportunity for public comment on regulations issued without prior notice.

Accordingly, interested persons are invited to participate in the rulemaking by submitting written data, views, or arguments as they may desire. Comments must include the regulatory docket or amendment number identified in this final rule and be submitted in duplicate to the address above. All comments received will be available in the Rules Docket for examination by interested persons. These rules may be changed in light of the comments received on this final rule.

Commenters who want the FAA to acknowledge receipt of comments submitted on this final rule must submit a preaddressed, stamped postcard with those comments on which the following statement is made: "Comments to Docket No. 25690." The postcard will be date stamped by the FAA and refunded to the commenter. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

* * * * *

Reason for No Notice and Immediate Adoption

These rules are needed immediately to implement the statutory authority given to the FAA in Pub. L. 100-223, signed by the President on December 30, 1987. The amendments enable the FAA to assess civil penalties for violations arising under the Federal Aviation Act, or a rule, regulation, or order issued thereunder, upon written notice and finding of violation by the Administrator. The legislation requires that civil penalty actions initiated under this authority be assessed only after notice and an opportunity for a hearing on the record in accordance with section 554 of the Administrative Procedure Act. The authority granted to the FAA by the amended legislation is effective only until December 30, 1989.

The amendment to the Federal Aviation Act requires the Administrator to set up a "Civil Penalty Assessment Demonstration Program" to study the effectiveness of the amendment. The legislation also requires the FAA to report to Congress, no later than June 30, 1989, on the results of the study required by the legislation. The FAA reviewed the existing procedural rules governing enforcement hearings and determined that these procedures are inadequate to provide the appropriate level of procedural formality dictated by Congress in the legislation. For these reasons, notice and public comment procedures are impracticable, unnecessary, and contrary to the public interest. Moreover, good cause exists to make these procedural rules effective in less than 30 days. In accordance with the DOT Regulatory Policies and procedures, an opportunity for public comment on the final rule is provided.

* * * * *

The Amendments

Accordingly, the Federal Aviation Administration amends Part 13 of the Federal Aviation Regulations (14 CFR Part 13), effective September 7, 1988 as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

1. The authority citation for Part 13 is revised to read as follows:

Authority: 49 U.S.C. 1354(a) and (c), 1374(d), 1401-1406, 1421-1428, 1471, 1475, 1481, 1482 (a), (b), and (c), and 1484-1489 (Federal Aviation Act of 1958) (as amended, 49 U.S.C. App. 1475, Airport and Airway Safety and Capacity Expansion Act of 1987); 49 U.S.C. App. 1655(c) (Department of Transportation Act) (Revised, 49 U.S.C. 106(g)); 49 U.S.C. 1808, 1809, and 1810 (Hazardous Materials Transportation Act); 49 U.S.C. 1727 and 1730 (Airport and Airway Development Act of 1970); 49 U.S.C. 2218 and 2219 (Airport and Airway Improvement Act of 1982); 49 U.S.C. 2201 (as amended, 49 U.S.C. App. 2218, Airport and Airway Safety and Capacity Expansion Act of 1987); 18 U.S.C. 6002 and 6004 (Organized Crime Control Act of 1970); 49 CFR 1.47 (f), (k), and (q) Regulations of the Office of the Secretary of Transportation).

2. Section 13.15 is revised to read as follows:

§ 13.15 Civil penalties: Federal Aviation Act of 1958 involving an amount in controversy in excess of $50,000; an in rem action; seizure of aircraft; or injunctive relief.

(a) The following penalties apply to persons who violate the Federal Aviation Act of 1958, as amended:

(1) Any person who violates any provision of Title III, V, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than $1000 for each violation, in accordance with section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*).

(2) Any person who violates section 404(d) of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than $2,000 for each violation, in accordance with section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*).

(3) Any person who operates aircraft for the carriage of persons or property for compensation or hire (other than an airman serving in the capacity of an airman) is subject to a civil penalty of not more than $10,000 for each violation of Title III, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, occurring after December 30, 1987, in accordance with section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471 *et seq.*).

(b) The authority of the Administrator, under section 901 of the Federal Aviation Act of 1958, as amended, to propose a civil penalty for a violation of that Act, or a rule, regulation, or order issued thereunder, and the ability to refer cases to the United States Attorney General, or the delegate of the Attorproposed by the Administrator, involving an amount ney General, for prosecution of civil penalty actions proposed by the Administrator, involving an amount in controversy in excess of $50,000, an *in rem* action, seizure of aircraft subject to lien, or suit for injunctive relief, or for collection of an assessed civil pen-

alty, is delegated to the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center.

(c) The Administrator may compromise any civil penalty, proposed in accordance with section 901 of the Federal Aviation Act of 1958, as amended, involving an amount in controversy in excess of $50,000, an *in rem* action, seizure of aircraft subject to lien, or suit for injunctive relief, prior to referral of the civil penalty action to the United States Attorney General, or the delegate of the Attorney General, for prosecution.

(1) The Administrator, through the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center, sends a civil penalty letter to the person charged with a violation of the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder. The civil penalty letter contains a statement of the charges, the applicable law, rule, regulation, or order, the amount of civil penalty that the Administrator will accept in full settlement of the action or an offer to compromise the civil penalty.

(2) Not later than 30 days after receipt of the civil penalty letter, the person charged with a violation may present any material or information in answer to the charges to the agency attorney, either orally or in writing, that may explain, mitigate, or deny the violation or that may show extenuating circumstances. The Administrator will consider any material or information submitted in accordance with this paragraph to determine whether the person is subject to a civil penalty or to determine the amount for which the Administrator will compromise the action.

(3) If the person charged with the violation offers to compromise for a specific amount, that person shall send a certified check or money order for that amount, payable to the Federal Aviation Administration, to the agency attorney. The Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, or the Assistant Chief Counsel for a region or center, may accept the certified check or money order or may refuse and return the certified check or money order.

(4) If the offer to compromise is accepted by the Administrator, the agency attorney will send a letter to the person charged with the violation stating that the certified check or money order is accepted in full settlement of the civil penalty action.

(5) If the parties cannot agree to compromise the civil penalty action or the offer to compromise is rejected and the certified check or money order submitted in compromise is returned, the Administrator may refer the civil penalty action to the United States Attorney General, or the delegate of the Attorney General, to begin proceedings in a United States District Court, pursuant to the authority in section 903 of the Federal Aviation Act, as amended (49 U.S.C. 1473), to prosecute and collect the civil penalty.

3. Section 13.16 is revised to read as follows:

§ 13.16 Civil Penalties: Federal Aviation Act of 1958, involving an amount in controversy not exceeding $50,000; Hazardous Materials Transportation Act.

(a) The following penalties apply to persons who violate the Federal Aviation Act of 1958, as amended, and the Hazardous Materials Transportation Act:

(1) Any person who violates any provision of Title III, V, VI, or XII of the Federal Aviation Act of

1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than $1,000 for each violation, in accordance with section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*).

(2) Any person who violates section 404(d) of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than $2,000 for each violation, in accordance with section 901 of the Federal Aviation Act of 1958, as amended, (49 U.S.C. 1471 *et seq.*).

(3) Any person who operates aircraft for the carriage of persons or property for compensation or hire (other than an airman serving in the capacity of an airman) is subject to a civil penalty of not more than $10,000 for each violation of Title III, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, occurring after December 30, 1987, in accordance with section 901 of the Federal Aviation Act of 1958, as amended, (49 U.S.C. 1471 *et seq.*).

(4) Any person who knowingly commits an act in violation of the Hazardous Materials Transportation Act, or any rule, regulation, or order issued thereunder is subject to a civil penalty of not more than $10,000 for each violation, in accordance with section 901 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act (49 U.S.C. 1471 and 1809 *et seq.*). An order assessing civil penalty for a violation under the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder, will be issued only after consideration of—

(i) The nature and circumstances of the violation;

(ii) The extent and gravity of the violation;

(iii) The person's degree of culpability;

(iv) The person's history of prior violations;

(v) The person's ability to pay the civil penalty;

(vi) The effect on the person's ability to continue in business; and

(vii) Such other matters as justice may require.

(b) An order assessing civil penalty may be issued for a violation described in paragraphs (a)(1), (a)(2), (a)(3), and (a)(4) of this section after notice and opportunity for a hearing.

(c) The authority of the Administrator, under sections 901 and § 905 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act, to initiate and assess civil penalties for a violation of those Acts, or a rule, regulation, or order issued thereunder and the authority under section 901 of the Federal Aviation Act of 1958, as amended, and the ability to refer cases to the United States Attorney General, or the delegate of the Attorney General, for collection of assessed civil penalties, is delegated to the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center.

(d) *Notice of proposed civil penalty.* A civil penalty action is initiated by sending a notice of proposed civil penalty to the person charged with a violation of the Federal Aviation Act of 1958, as amended, the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder. The notice of proposed civil penalty contains a statement of the charges and the amount of the proposed civil penalty.

(e) *Procedures following receipt of notice of proposed civil penalty.* Not later than 30 days after receipt of the notice of proposed civil penalty, the

person charged with a violation shall do one of the following:

(1) The person shall submit the amount of the proposed civil penalty in which case an order assessing civil penalty shall be issued in that amount.

(2) The person shall participate in the informal procedures provided in paragraph (f) of this section.

(3) The person shall request a hearing, pursuant to paragraph (i) of this section, in which case an order of civil penalty shall be issued and shall be filed with the hearing docket clerk as the complaint in the proceedings.

(f) *Informal procedures.* Not later than 30 days after receipt of the notice of proposed civil penalty, the person charged with a violation, who wants to participate in informal procedures, shall do one of the following:

(1) The person shall submit any information, including documents and witness statements, in writing, to the agency attorney, demonstrating that a violation of the regulations did not occur or that the penalty or the amount of the penalty is not warranted by the circumstances.

(2) The person shall submit a written request to the agency attorney to reduce the proposed civil penalty and shall submit, in writing, the reasons and documents supporting the reduction of the proposed civil penalty, including records indicating a financial inability to pay or records showing that payment of the proposed civil penalty would prevent the person from continuing in business, or

(3) The person shall submit a written request to the agency attorney for an informal conference to discuss the matter with the agency attorney and to

submit relevant information or documents to the agency attorney.

(g) *Procedures following interim reply or informal conference.* Not later than 10 day after the person charged with a violation receives an interim reply to any submission made in accordance with paragraphs (f)(1) or (f)(2) or not later than 10 days after an informal conference, the person charged with the violation shall do one of the following:

(1) The person shall submit the amount of the proposed civil penalty in which case an order assessing civil penalty shall be issued in that amount.

(2) The person shall submit additional written information to the agency attorney for consideration.

(3) The person shall request a hearing, pursuant to paragraph (i) of this section, in which case an order of civil penalty shall be issued and shall be filed with the hearing docket clerk as the complaint in the proceedings.

(b) *Order of civil penalty.* An order of civil penalty shall be issued if the person charged with a violation requests a hearing in accordance with paragraph (e)(3) or paragraph (g)(3) of this section.

(i) *Request for a hearing.* Any person who receives a notice of proposed civil penalty may request a hearing, pursuant to paragraph (e)(3) or paragraph (g)(3) of this section, to be conducted in accordance with the procedures in Subpart G of this part. A person requesting a hearing shall file a written request for a hearing with the agency attorney. The request for a hearing may be in the form of a letter but must be dated and signed by the person requesting a hearing. The request for a hearing may be typewritten or may be legibly handwritten. A

person requesting a hearing shall include a suggested location for the hearing in the request for a hearing.

(j) *Order assessing civil penalty.* An order assessing civil penalty shall be issued if the person charged with a violation—

(1) Submits the amount of the proposed civil penalty in which case the order assessing civil penalty shall reflect receipt of the civil penalty;

(2) Does not respond in a timely manner to the notice of proposed civil penalty;

(3) Does not respond in a timely manner to interim replies from the agency attorney under paragraph (g) of this section; or

(4) Does not comply with any agreement reached between the parties during an informal conference.

(k) *Payment.* A person charged with a violation may pay the amount of the civil penalty proposed in the notice or stated in the order, or an amount agreed upon, by sending a certified check or money order, payable to the Federal Aviation Administration, to the agency attorney.

(l) *Hearing.* If the person charged with the violation requests a hearing pursuant to paragraph (e)(3) or paragraph (g)(3) of this section, the order of civil penalty shall be issued and shall be filed with the hearing docket clerk as the complaint in the proceedings. The procedural rules in Subpart G of this part apply to the hearing and any appeal. At the close of the hearing, the administrative law judge shall issue, either orally on the record or in writing, an initial decision, including the reasons for the decision, that affirms, modifies, or reverses the order of civil penalty. An order of civil penalty, as affirmed or modified by the administrative law judge, shall become an order assessing civil penalty if a party

does not appeal the administrative law judge's initial decision to the FAA decisionmaker.

(m) *Appeal.* Either party may appeal the administrative law judge's initial decision to the FAA decisionmaker pursuant to the procedures in Subpart G of this part. If a party files a notice of appeal pursuant to § 13.233 of Subpart G, the effectiveness of any order assessing civil penalty is stayed until a final decision and order of the Administrator has been entered on the record. The FAA decisionmaker shall review the record of the hearing and issue a final decision and order of the Administrator that affirms, modifies, or reverses the order assessing civil penalty. The FAA decisionmaker shall not assess a civil penalty in an amount greater than the amount stated in the order of civil penalty.

(n) *Exhaustion of administrative remedies.* A party may only appeal a final decision and order of the Administrator to the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia pursuant to section 1006 of the Federal Aviation Act of 1958, as amended. An order or an initial decision of an administrative law judge, that has not been appealed to the FAA decisionmaker, does not constitute a final order of the Administrator for the purposes of judicial appellate review under section 1006 of the Federal Aviation Act of 1958, as amended.

(o) If a person subject to an order assessing civil penalty does not pay the assessed civil penalty within 60 days after service of the order assessing civil penalty, the Administrator may refer the order to the United States Attorney General, or the delegate of the Attorney General, to begin proceedings in a United States District Court, pursuant to the author-

ity in section 903 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1473), or section 110 of the Hazardous Materials Transportation Act (49 U.S.C. 1809), to collect the civil penalty.

(p) *Compromise.* The Administrator may compromise any civil penalty, assessed in accordance with sections 901 and 905 of the Federal Aviation Act of 1958, as amended, involving an amount in controversy not exceeding $50,000, or any civil penalty assessed in accordance with section 901 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act, at any time prior to referring the order assessing civil penalty to the United States attorney for collection.

4. Section 13.31 is revised to read as follows:

§ 13.31 Applicability

This subpart applies to proceedings in which a hearing has been requested in accordance with §§ 13.19(c)(5), 13.20(c), 13.20(d), 13.75(a)(2), 13.75(b), or 13.81(e).

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

5. Part 13 is amended by adding a new Subpart G to read as follows:

Subpart G—Rules of Practice in FAA Civil Penalty Actions

Sec.

13.201 Applicability.
13.202 Definitions.
13.203 Separation of functions.

13.204 Appearances and rights of parties.
13.205 Administrative law judges.
13.206 Intervention.
13.207 Certification of documents.
13.208 Complaint.
13.209 Answer.
13.210 Filing of documents.
13.211 Service of documents.
13.212 Computation of time.
13.213 Extension of time.
13.214 Amendment of pleadings.
13.215 Withdrawal of a complaint or request for a hearing.
13.216 Waivers.
13.217 Joint procedural or discovery schedule.
13.218 Motions.
13.219 Interlocutory appeals.
13.220 Discovery.
13.221 Notice of hearing.
13.222 Evidence.
13.223 Standard of proof.
13.224 Burden of proof.
13.225 Offer of proof.
13.226 Public disclosure of evidence.
13.227 Testimony by agency employees.
13.228 Subpoenas.
13.229 Witness fees.
13.230 Record.
13.231 Argument before the administrative law judge.
13.232 Initial decision.
13.233 Appeals from initial decisions.
13.234 Petitions to reconsider or modify a final decision and order of the FAA decisionmaker on appeal.
13.235 Judicial review of final decision and order.

Subpart G—Rules of Practice in FAA Civil Penalty Actions

§ 13.201 Applicability.

(a) This subpart applies to the following actions:

(1) A civil penalty action, initiated after September 7, 1988, in which an order of civil penalty has been issued not exceeding $50,000 for a violation arising under the Federal Aviation Act of 1958, as amended, (49 U.S.C. 1301 *et seq.*), or a rule, regulation, or order issued thereunder.

(2) A civil penalty action initiated after September 7, 1988, in which an order of civil penalty has been issued for a violation arising under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471 *et seq.*) and the Hazardous Materials Transportation Act (49 U.S.C. 1801 *et seq.*), or a rule, regulation, or order issued thereunder.

(b) This subpart applies only to proceedings initiated after September 7, 1988. All other cases, hearings, or other proceedings pending or in progress at the time this subpart is effective are not affected by the rules in this subpart.

(c) Notwithstanding the provisions of paragraph (a) of this section, the United States district courts shall have exclusive jurisdiction of any civil penalty action initiated by the Administrator—

(1) Which involves an amount in controversy in excess of $50,000;

(2) Which is an *in rem* action or in which an *in rem* action based on the same violation has been brought;

(3) Regarding which an aircraft subject to lien has been seized by the United States; and

(4) In which a suit for injunctive relief based on the violation giving rise to the civil penalty has also been brought.

§ 13.202 Definitions.

"Administrative law judge" means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105.

"Agency attorney" means the Assistant Chief Counsel for Regulations and Enforcement, the Assistant Chief Counsel for a region or center, or an attorney designated to prosecute a case. An agency attorney shall not include any attorney who advises the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker or who is supervised by a person who provides advice to the FAA decisionmaker in a case.

"Attorney" means a person licensed by a state, the District of Columbia, or a territory of the United States to practice law or appear before the courts of that state or territory.

"Complaint" means an order of civil penalty issued pursuant to the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder, which has been filed with the Hearing Docket after a hearing has been requested.

"FAA decisionmaker" means the Administrator of the Federal Aviation Administration, acting in the capacity of the decisionmaker on appeal, or any person to whom the Administrator has delegated the Administrator's decisionmaking authority in a civil

penalty action. As used in this subpart, the FAA decisionmaker is the official authorized to issue a final decision and order of the Administrator in a civil penalty action.

"Mail" includes U.S. certified mail, U.S. registered mail, or use of an overnight express courier service.

"Order assessing civil penalty" means an order that contains a finding or determination of violation arising under the Federal Aviation Act, as amended, or a rule, regulation, or order issued thereunder, or a violation of the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder, and directs a person to pay a civil penalty for the violation.

"Order of civil penalty" means an order issued after a person requests a hearing pursuant to § 13.16 (e) (3) or 13.16(g) (3) of this part and which is filed with the docket clerk as the complaint in the proceedings.

"Party" means the agency attorney or the respondent named in an order of civil penalty.

"Personal delivery" includes hand-delivery or use of a contract or express messenger service. "Personal delivery" does not include use of government interoffice mail service.

"Pleading" means a complaint, an answer, and any amendment of these documents permitted under this subpart.

"Properly addressed" means a document that shows an address contained in FAA records, a residential, business, or other address submitted by a person on any document provided by this subpart, or any other address shown by other reasonable and available means.

"Respondent" means a person to whom a civil penalty is directed and who has received an order of civil penalty.

§ 13.203 Separation of functions.

(a) Civil penalty proceedings, including hearings, shall be prosecuted by an agency attorney.

(b) Any agency attorney engaged in the performance of prosecutorial functions in a case shall not, in that case or a factually related case, participate in, or advise the FAA decisionmaker regarding, an initial decision or any appeal to the FAA decisionmaker under this subpart, except as a witness or counsel in public proceedings. The prohibition described in this paragraph shall begin at the time that a notice of proposed civil penalty is issued.

(c) The Chief Counsel shall not perform prosecutorial functions in a case and shall not supervise the agency attorney in the performance of prosecutorial functions in a case. The prohibitions described in this paragraph shall begin at the time that the notice of proposed civil penalty is issued.

(d) The Chief Counsel or the delegate of the Chief Counsel, other than individuals described in paragraph (a) of this section, shall advise the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker under this subpart.

§ 13.204 Appearances and rights of parties.

(a) Any party may appear and be heard in person.

(b) Any party may be accompanied, represented, or advised by an attorney or representative designated by the party and may be examined by that attorney or representative in any proceeding governed by this subpart. An attorney or representative who

represents a party may file a notice of appearance in the action, in the manner provided in § 13.210 of this subpart, and shall serve a copy of the notice of appearance on each party, in the manner provided in § 13.211 of this subpart, before participating in any proceeding governed by this subpart. The attorney or representative shall include the name, address, and telephone number of the attorney or representative in the notice of appearance.

(c) Any person may request a copy of a document upon payment of reasonable costs. A person may keep an original document, data, or evidence, with the consent of the administrative law judge, by substituting a legible copy of the document for the record.

§ 13.205 Administrative law judges.

(a) *Powers of an administrative law judge.* In accordance with the rules of this subpart, an administrative law judge may—

(1) Give notice of, and hold, prehearing conferences and hearings;

(2) Administer oaths and affirmations;

(3) Issue subpoenas authorized by law and issue notices of deposition requested by the parties;

(4) Rule on offers of proof;

(5) Receive relevant and material evidence;

(6) Regulate the course of the hearing in accordance with the rules of this subpart;

(7) Hold conferences to settle or to simplify the issues by consent of the parties;

(8) Dispose of procedural motions and requests; and

(9) Make findings of fact and conclusions of law, and issue an initial decision.

(b) *Limitations on the power of the administrative law judge.* The administrative law judge shall not issue an order of contempt, award costs to any party, or impose any sanction not specified in this subpart. If the administrative law judge imposes any sanction not specified in this subpart, a party may file an interlocutory appeal of right with the FAA decisionmaker pursuant to § 13.219(c)(4) of this subpart. This section does not preclude an administrative law judge from issuing an order that bars a person from a specific proceeding based on a finding of obstreperous or disruptive behavior in that specific proceeding.

(c) *Disqualification.* The administrative law judge may disqualify himself or herself at any time. A party may file a motion, pursuant to § 13.218(f)(6), requesting that an administrative law judge be disqualified from the proceedings.

§ 13.206 Intervention.

(a) Any person who has a statutory right to participate in the proceedings shall be allowed to intervene in the proceedings by the administrative law judge.

(b) In all other cases, the administrative law judge shall not allow any person to intervene in any proceeding governed by this subpart.

§ 13.207 Certification of documents.

(a) *Signature required.* The attorney of record, the party, or the party's representative shall sign each document tendered for filing with the hearing docket clerk, the administrative law judge, the FAA decisionmaker on appeal, or served on each party.

(b) *Effect of signing a document.* By signing a document, the attorney of record, the party, or the

party's representative certifies that the attorney or party has read the document and, based on reasonable inquiry and to the best of the attorney or party's knowledge, information, and belief, the document is—

(1) Consistent with these rules;

(2) Warranted by existing law or that a good faith argument exists for extension, modification, or reversal of existing law; and

(3) Not unreasonable or unduly burdensome or expensive, not made to harass any person, not made to cause unnecessary delay, not made to cause needless increase in the cost of the proceedings, or for any other improper purpose.

(c) *Sanctions.* If the attorney of record, the party, or the party's representative signs a document in violation of this section, the administrative law judge or the FAA decisionmaker shall—

(1) Strike the pleading signed in violation of this section;

(2) Strike the request for discovery or the discovery response signed in violation of this section and preclude further discovery by the party;

(3) Deny the motion or request signed in violation of this section;

(4) Exclude the document signed in violation of this section from the record;

(5) Dismiss the interlocutory appeal and preclude further appeal on that issue by the party who filed the appeal until an initial decision has been entered on the record; or

(6) Dismiss the appeal of the administrative law judge's initial decision to the FAA decisionmaker.

§ 13.208 Complaint.

(a) In accordance with §§ 13.16(e)(3) and 13.16(g)(3), an order of civil penalty shall serve as the complaint. The agency attorney shall serve the origi-

nal order of civil penalty on the person requesting the hearing.

(b) The agency attorney shall file the complaint, attaching a copy of the request for a hearing and shall suggest a location for the hearing, with the hearing docket clerk not later than 20 days after receipt of a person's request for hearing.

(c) If the agency attorney and the person requesting the hearing do not agree on the location for the hearing, the hearing docket clerk shall assign a hearing location near the place where the incident occurred.

§ 13.209 Answer.

(a) *Writing required.* A person who receives an order of civil penalty shall file a written answer to the order, or a motion pursuant to § 13.218(f)(1-4) of this subpart, not later than 30 days after service of the order of civil penalty. The answer may be in the form of a letter but must be dated and signed by the person responding to the order of civil penalty. An answer may be typewritten or may be legibly handwritten.

(b) *Filing and address.* A person filing an answer shall personally deliver or mail the answer for filing with the hearing docket clerk to the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue SW., Room 914E, Washington, DC 20591, Attn: Hearing Docket Clerk.

(c) *Contents.* A person filing an answer shall include a brief statement of the relief requested by the person in the answer. The person shall include specifically any affirmative defense in the answer that the person intends to assert at the hearing.

(d) *Specific denial of allegations required.* A person filing an answer shall admit, deny, or state that

the person is without sufficient knowledge or information to admit or deny each allegation in each numbered paragraph of the order of civil penalty. A general denial of the order of civil penalty is deemed a failure to file an answer. Any statement or allegation contained in the order of civil penalty that is not specifically denied in the answer is deemed an admission of the truth of that allegation.

(e) *Service.* A person filing an answer shall comply with the service requirements of § 13.211 of this subpart.

(f) *Failure to file answer.* A person's failure to file an answer without good cause is deemed an admission of the truth of each allegation contained in the order of civil penalty and an order assessing civil penalty shall be issued.

§ 13.210 Filing of documents.

(a) *Address and method of filing.* A person tendering a document for filing shall personally deliver or mail the signed original and one copy of each document to the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue SW., Room 914E, Washington, DC 20591, Attn: Hearing Docket Clerk. After an administrative law judge has been assigned to the proceedings, a person shall personally deliver or mail the signed original of each document to the hearing docket clerk and shall serve a copy of each document on each party and the administrative law judge.

(b) *Date of filing.* A document shall be considered to be filed on the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown

by other evidence if there is no certificate of service or postmark.

(c) *Form.* Each document shall be typewritten or legibly handwritten.

(d) *Contents.* Unless otherwise specified, in this subpart, each document must contain a short, plain statement of the facts on which the person's case rests and a brief statement of the action requested in the document.

§ 13.211 Service of documents.

(a) *General.* A person shall serve a copy of any document filed with the Hearing Docket on the administrative law judge and on each party at the time of filing.

(b) *Type of service.* A person may serve documents by personal delivery or by mail.

(c) *Certificate of service.* A person may attach a certificate of service to a document tendered for filing with the hearing docket clerk. A certificate of service shall consist of a statement, dated and signed by the person filing the document, that the document was personally delivered or mailed to each party on a specific date.

(d) *Date of service.* The date of service shall be the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.

(e) *Additional time after service by mail.* Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period.

(f) *Service by the administrative law judge.* The administrative law judge shall serve a copy of each document including, but not limited to, notices of prehearing conferences and hearings, rulings on motions, decisions, and orders, upon each party to the proceedings by personal delivery or by mail.

(g) *Valid service.* A document that was properly addressed, was sent in accordance with this subpart, and that was returned, that was not claimed, or that was refused, is deemed to have been served in accordance with this subpart. The service shall be considered valid as of the date and the time that the document was deposited with a contract or express messenger, the document was mailed, or personal delivery of the documents was refused.

(h) *Presumption of service.* There shall be a presumption of service where a party or a person, who customarily receives mail, or receives it in the ordinary course of business, at either the person's residence or the person's principal place of business, acknowledges receipt of the document.

§ 13.212 Computation of time.

(a) This section applies to any period of time prescribed or allowed by this subpart, by notice or order of the administrative law judge, or by any applicable statute.

(b) The date of an act, event, or default, after which a designated time period begins to run, is not included in a computation of time under this subpart.

(c) The last day of a time period is included in a computation of time unless it is a Saturday, Sunday, or a legal holiday. If the last day of the time period is a Saturday, Sunday, or legal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

§ 13.213 Extension of time.

(a) *Oral requests.* The parties may reasonably agree to extend the time for filing a document under this subpart. If the parties agree, the administrative law judge shall grant one extension of time to each party. The party seeking the extension of time shall submit a draft order to the administrative law judge to be signed by the administrative law judge and filed with the hearing docket clerk. The administrative law judge may grant additional oral requests for an extension of time where the parties agree to the extension.

(b) *Written motion.* A party shall file a written motion for an extension of time with the administrative law judge not later than 7 days before the document is due unless good cause for the late filing is shown. A party filing a written motion for an extension of time shall serve a copy of the motion on each party. The administrative law judge may grant the extension of time if good cause for the extension is shown.

(c) *Failure to rule.* If the administrative law judge fails to rule on a written motion for an extension of time by the date the document was due, the motion for an extension of time is deemed granted for no more than 20 days after the original date the document was to be filed.

§ 13.214 Amendment of pleadings.

(a) *Filing and service.* A party shall file the amendment with the administrative law judge and shall serve a copy of the amendment on all parties to the proceeding.

(b) *Time.* A party shall file an amendment to a complaint or an answer within the following:

(1) Not later than 15 days before the scheduled date of a hearing, a party may amend a complaint or an answer without the consent of the administrative law judge.

(2) Less than 15 days before the scheduled date of a hearing, the administrative law judge may allow amendment of a complaint or an answer only for good cause shown in a motion to amend.

(c) *Responses.* The administrative law judge shall allow a reasonable time, but not more than 20 days from the date of filing, for other parties to respond if an amendment to a complaint, answer, or other pleading has been filed with the administrative law judge.

§ 13.215 Withdrawal of a complaint or request for a hearing.

At any time before or during a hearing, the agency attorney may withdraw a complaint or a party may withdraw a request for a hearing without the consent of the administrative law judge. If the agency attorney withdraws the complaint or a party withdraws the request for a hearing and the answer, the administrative law judges shall dismiss the proceedings in this subpart with prejudice.

§ 13.216 Waivers.

Waivers of any rights provided by statute or regulation shall be in writing or by stipulation made at a hearing and entered into the record. The parties shall set forth the precise terms of the waiver and any conditions.

§ 13.217 Joint procedural or discovery schedule.

(a) *General.* The parties may agree to submit a schedule for filing all prehearing motions, a schedule

for conducting discovery in the proceedings, or a schedule that will govern all prehearing motions and discovery in the proceedings.

(b) *Form and content of schedule.* If the parties agree to a joint procedural or discovery schedule, one of the parties shall file the joint schedule with the administrative law judge, setting forth the dates to which the parties have agreed, and shall serve a copy of the joint schedule on each party.

(1) The joint schedule may include, but need not be limited to, requests for discovery, any objections to discovery requests to which there are no objections, submission of prehearing motions, responses to prehearing motions, exchange of exhibits to be introduced at the hearing, and a list of witnesses that may be called at the hearing.

(2) Each party shall sign the original joint schedule to be filed with the administrative law judge.

(c) *Time.* The parties may agree to submit all prehearing motions and responses and may agree to close discovery in the proceedings under the joint schedule within a reasonable time before the date of the hearing, but not later than 15 days before the hearing.

(d) *Order establishing joint schedule.* The administrative law judge shall approve the joint schedule filed by the parties. One party shall submit a draft order establishing a joint schedule to the administrative law judge to be signed by the administrative law judge and filed with the hearing docket clerk.

(e) *Disputes.* The administrative law judge shall resolve disputes regarding discovery or disputes regarding compliance with the joint schedule as soon as possible so that the parties may continue to comply with the joint schedule.

(f) *Sanctions for failure to comply with joint schedule.* If a party fails to comply with the administrative law judge's order establishing a joint schedule, the administrative law judge may direct that party to comply with a motion or discovery request or, limited to the extent of the party's failure to comply with a motion or discovery request, the administrative law judge may—

(1) Strike that portion of a party's pleadings;

(2) Preclude prehearing or discovery motions by that party;

(3) Preclude admission of that portion of a party's evidence at the hearing; or

(4) Preclude that portion of the testimony of that party's witnesses at the hearing.

§ 13.218 *Motions.*

(a) *General.* A party applying for an order or ruling not specifically provided in this subpart shall do so by motion. A party shall comply with the requirements of this section when filing a motion with the administrative law judge. A party shall serve a copy of each motion on each party.

(b) *Form and contents.* A party shall state the relief sought by the motion and the particular grounds supporting that relief. If a party has evidence in support of a motion, the party shall attach any supporting evidence, including affidavits to the motion.

(c) *Filing of motions.* A motion made prior to the hearing must be in writing. Unless otherwise agreed by the parties or for good cause shown, a party shall file any prehearing motion, and shall serve a copy on each party, not later than 30 days before the hearing. Motions introduced during a hearing may be made orally on the record unless the administrative law judge directs otherwise.

(d) *Answers to motions.* Any party may file an answer, with affidavits or other evidence in support of the answer, not later than 10 days after service of a written motion on that party. When a motion is made during a hearing, the answer may be made at the hearing on the record, orally or in writing, within a reasonable time determined by the administrative law judge.

(e) *Rulings on motions.* The administrative law judge shall rule on all motions as follows:

(1) *Discovery motions.* The administrative law judge shall resolve all pending discovery motions not later than 10 days before the hearing.

(2) *Prehearing motions.* The administrative law judge shall resolve all pending prehearing motions not later than 7 days before the hearing. If the administrative law judge issues a ruling or order orally, the administrative law judge shall serve a written copy of the ruling or order, within 3 days, on each party. In all other cases, the administrative law judge shall issue rulings and orders in writing and shall serve a copy of the ruling or order on each party.

(3) *Motions made during the hearing.* The administrative law judge may issue rulings and orders on motions made during the hearing orally. Oral rulings or orders on motions must be made on the record.

(f) *Specific motions.* A party may file the following motions with the administrative law judge:

(1) *Motion to dismiss for insufficiency.* A party may file a motion to dismiss the order of civil penalty fo insufficiency instead of an answer. If the administrative law judge denies the motion to dismiss the order of civil penalty for insufficiency, the party who received the order of civil penalty shall file an answer

not later than 10 days of service of the administrative law judge's denial of the motion. A motion to dismiss the order of civil penalty for insufficiency must show that the order of civil penalty fails to state a violation of the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or a violation of the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder.

(2) *Motion to dismiss.* A party may file a motion to dismiss an order of civil penalty instead of an answer, specifying the grounds for dismissal.

(i) If a motion to dismiss is not granted, the respondent shall file an answer wtih the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the administrative law judge's ruling or order on the motion to dismiss.

(ii) If the administrative law judge grants a motion to dismiss and terminates the proceedings without a hearing, the agency attorney may file an appeal pursuant to § 13.233 of this subpart. If the administrative law judge grants a motion to dismiss in part, the agency attorney may appeal the administrative law judge's decision to dismiss part of the order of civil penalty under the provisions of § 13.219(c) of this subpart. If required by the decision on appeal, the respondent shall file an answer with the administrative law judge, and shall serve a copy of the answer on each party, not later than 10 days after service of the decision on appeal.

(3) *Motion for more definite statement.* A party may file a motion for more definite statement of any pleading which requires a response under this subpart. A party shall set forth, in detail, the indefinite or uncertain allegations contained in an order of civil

penalty or response to any pleading and shall submit the details that the party believes would would make the allegation or response definite and certain.

(i) *Order of civil penalty.* A party may file a motion requesting a more definite statement of the allegations contained in the order of civil penalty instead of an answer. If the administrative law judge grants the motion, and the agency attorney does not supply a more definite statement not later than 15 days after service of the order granting the motion, the administrative law judge shall strike the allegations in the order of civil penalty to which the motion is directed. If the administrative law judge denies the motion, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the order of denial.

(ii) *Answer.* A party may file a motion requesting a more definite statement if an answer fails to clearly respond to the allegations in the order of civil penalty. If the administrative law judge grants the motion, the respondent shall supply a more definite statement not later than 15 days after service of the ruling on the motion. If the respondent fails to supply a more definite statement, the administrative law judge shall strike those statements in the answer to which the motion is directed. A party's failure to supply a more definite statement is deemed a failure to answer and the unanswered allegations in the order of civil penalty are deemed admitted.

(4) *Motion to strike.* Any party may make a motion to strike any insufficient allegation or defense, or any redundant, immaterial, or irrelevant matter in a pleading. A party shall file a motion to strike with the administrative law judge and shall serve a copy on each party before a response is required under this

subpart or, if a response is not required, not later than 10 days after service of the pleading.

(5) *Motion for decision.* A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact disputed by the parties.

(6) *Motion for disqualification.* A party may file a motion for disqualification with the administrative law judge and shall serve a copy on each party. A party may file the motion at any time after the administrative law judge has been assigned to the proceedings but shall make the motion before the administrative law judge files an initial decision in the proceedings.

(i) *Motion and supporting affidavit.* A party shall state the grounds for disqualification, including, but not limited to, personal bias, pecuniary interest, or other factors showing disqualification, in the motion for disqualification. A party shall submit an affidavit with the motion for disqualification that sets forth, in detail, the matters alleged to constitute grounds for disqualification.

(ii) *Answer.* A party shall respond to the motion for disqualification not later than 5 days after service of the motion for disqualification.

(iii) *Decision on motion for disqualification.* The administrative law judge shall render a decision on the motion for disqualification not later than 15 days after the motion has been filed. If the administrative law judge finds that the motion for disqualification and supporting affidavit show a basis for disqualification, the administrative law judge shall withdraw from the proceedings immediately. If the administrative law judge finds that disqualification is not warranted, the administrative law judge shall deny the motion and state the grounds for the denial on the record. If the administrative law judge fails to rule on a party's motion for disqualification within 15 days after the motion has been filed, the motion is deemed granted.

(iv) *Appeal.* A party may appeal the administrative law judge's denial of the motion for disqualification in accordance with § 13.219 of this subpart.

§ 13.219 Interlocutory appeals.

(a) *General.* Unless otherwise provided in this subpart, a party may not appeal a ruling or decision of the administrative law judge to the FAA decisionmaker until the initial decision has been entered on the record. A decision or order of the FAA decisionmaker on the interlocutory appeal does not constitute a final order of the Administrator for the purposes of judicial appellate rveiew under section 1006 of the Federal Aviation Act of 1958, as amended.

(b) *Interlocutory appeal for cause.* If a party files a written request for an interlocutory appeal for cause with the administrative law judge, or orally requests an interlocutory appeal for cause, the proceedings are stayed until the administrative law judges issues a decision on the request. If the administrative law judge grants the request, the proceed-

ings are stayed until the FAA decisionmaker issues a decision on the interlocutory apepal. The administrative law judge shall grant an interlocutory appeal for cause if a party shows that delay of the appeal would be detrimental to the public interest or would result in undue prejudice to any party.

(c) *Interlocutory appeals of right.* If a party notifies the administrative law judge of an interlocutory appeal of right, the proceedings are stayed until the FAA decisionmaker issues a decision on the interlocutory appeal. A party may file an interlocutory appeal with the FAA decisionmaker, without the consent of the administrative law judge, before an initial decision has been entered in the case of—

(1) A ruling or order by the administrative law judge barring a person from the proceedings;

(2) Failure of the administrative law judge to dismiss the proceedings in accordance with § 13.215 of this subpart;

(3) A ruling or order by the administrative law judge in violation of § 13.205(b) of this subpart; and

(4) A ruling by the administrative law judge granting, in part, a respondent's motion to dismiss an order of civil penalty pursuant to § 13.218(f)(2)(B).

(d) *Procedure.* A party shall file a notice of interlocutory appeal, with supporting documents, with the FAA decisionmaker and the hearing docket clerk, and shall serve a copy of the notice and supporting documents on each party and the administrative law judge, not later than 3 days after the administrative law judge's decision forming the basis of the appeal. A party shall file a reply brief, if any, with the FAA decisionmaker and serve a copy of the reply brief on each party, not later than 10 days after service of the appeal brief. If the FAA decisionmaker does not issue a decision on the interlocutory appeal or does

not seek additional information within 10 days of the filing of the appeal, the stay of the proceeding is dissolved. The FAA decisionmaker shall render a decision on the interlocutory appeal, on the record and as a part of the decision in the proceedings, within a reasonable time after receipt of the interlocutory appeal.

(e) The FAA decisionmaker may reject frivolous, repetitive, or dilatory appeals, and may issue an order precluding one or more parties from making further interlocutory appeals in a proceeding in which there have been frivolous, repetitive, or dilatory interlocutory appeals.

§ 13.220 Discovery.

(a) *Initiation of discovery.* Any party may initiate discovery described in this section, without the consent or approval of the administrative law judge, at any time after a complaint has been filed in the proceedings.

(b) *Methods of discovery.* The following methods of discovery are permitted under this section: Depositions on oral examination or written questions of any person; written interrogatories directed to a party; requests for production of documents or tangible items to any person; and requests for admission by a party. A party is not required to file written interrogatories and responses, requests for production of documents or tangible items and responses, and requests for admission and responses with the administrative law judge or the hearing docket clerk. In the event of a discovery dispute, a party shall attach a copy of these documents in support of a motion made under this section.

(c) *Service on the agency.* A party shall serve each discovery request directed to the agency or an agency employee on the agency attorney of record.

(d) *Time for responses to discovery requests.* Unless otherwise directed by this subpart or agreed by the parties, a party shall respond to a request for discovery, including filing objections to a request for discovery, not later than 30 days of service of the request.

(e) *Scope of discovery.* Subject to the limits on discovery set forth paragraph (f) of this section, a party may discover any matter that is not privileged and that is relevant to the subject matter of the proceeding. A party may discover information that relates to the claim or defense of any party including the existence, description, nature, custody, condition, and location of any document or other tangible item and the identity and location of any person having knowledge of discoverable matter. A party may discover facts known, or opinions held, by an expert who any other party experts to call to testify at the hearing. A party has no ground to object to a discovery request on the basis that the information sought would not be admissible at the hearing if the information sought during discovery is reasonably calculated to lead to the discovery of admissible evidence.

(f) *Limiting discovery.* The administrative law judge shall limit the frequency and extent of discovery permitted by this section if a party shows that—

(1) The information requested is cumulative or repetitious;

(2) The information requested can be obtained from another less burdensome and more convenient source;

(3) The party requesting the information has had ample opportunity to obtain the information through other discovery methods permitted under this section;

(4) The method or scope of discovery requested by the party is unduly burdensome or expensive.

(g) *Confidential orders.* A party or person who has received a discovery request for information that is related to a trade secret, confidential or sensitive material, competitive or commercial information, proprietary data, or information on research and development, may file a motion for a confidential order with the administrative law judge and shall serve a copy of the motion for a confidential order on each party.

(1) The party or person making the motion must show that the confidential order is necessary to protect the information from disclosure to the public.

(2) If the administrative law judge determines that the requested material is not necessary to decide the case, the administrative law judge shall preclude any inquiry into the matter by any party.

(3) If the administrative law judge determines that the requested material may be disclosed during discovery, the administrative law judge may order that the material may be discovered and disclosed under limited conditions or may be used only under certain terms and conditions.

(4) If the administrative law judge determines that the requested material is necessary to decide the case and that a confidential order is warranted, the administrative law judge shall provide—

(i) An opportunity for review of the document by the parties off the record;

(ii) Procedures for excluding the information from the record; and

(iii) Order that the parties shall not disclose the information in any manner and the parties shall not use the information in any other proceeding.

(h) *Protective orders.* A party or a person who has received a request for discovery may file a motion for protective order with the administrative law judge and shall serve a copy of the motion for protective order on each party. The party or person making the motion must show that the protective order is necessary to protect the party or the person from annoyance, embarrassment, oppression, or undue burden or expense. As part of the protective order, the administrative law judge may—

(1) Deny the discovery request;

(2) Order that discovery be conducted only on specified terms and conditions, including a designation of the time or place for discovery or a determination of the method of discovery; or

(3) Limit the scope of discovery or preclude any inquiry into certain matters during discovery.

(i) *Duty to supplement or amend responses.* A party who has responded to a discovery request has a duty to supplement or amend the response, as soon as the information is known, as follows:

(1) A party shall supplement or amend any response to a question requesting the identity and location of any person having knowledge of discoverable matters.

(2) A party shall supplement or amend any response to a question requesting the identity of each person who will be called to testify at the hearing as an expert witness' the subject matter and substance of that witness, testimony.

(3) A party shall supplement or amend any response that was incorrect when made or any response

that was correct when made but is no longer correct. accurate, or complete.

(j) *Depositions.* The following rules apply to depositions taken pursuant to this section:

(1) *Form.* A deposition shall be taken on the record and reduced to writing. The person being deposed shall sign the deposition unless the parties agree to waive the requirement of a signature.

(2) *Administration of oaths.* Within the United States, or a territory or possession subject to the jurisdiction of the United States, a party shall take a deposition, before a person authorized to administer oaths by the laws of the United States or authorized by the law of the place where the examination is held. In foreign countries, a party shall take a deposition in any manner allowed by the *Federal Rules of Civil Procedure.*

(3) *Notice of deposition.* A party shall serve a notice of deposition, stating the time and place of the deposition and the name and address of each person to be examined, on the person to be deposed, on the administrative law judge, on the hearing docket clerk, and on each party not later than 7 days before the deposition. A party may serve a notice of deposition less than 7 days before the deposition only with consent of the administrative law judge. If a subpoena *duces tecum* is to be served on the person to be examined, the party shall attach a copy of the subpoena *duces tecum*, that describes the materials to be produced at the deposition, to the notice of deposition.

(4) *Use of depositions.* A party may use any part or all of a deposition at a hearing authorized under this subpart only upon a showing of good cause. The deposition may be used against any party who was present or represented at the deposition or who had reasonable notice of the deposition.

(k) *Interrogatories.* A party shall not serve more than 30 interrogatories to each other party. Each subjart of an interrogatory shall be counted as a separate interrogatory.

(1) A party shall answer each interrogatory separately and completely in writing and under oath. A party's attorney may sign the response to the interrogatories if the attorney has verification of authority to sign from the party. If a party objects to an interrogatory, the party shall state the objection and the reasons for the objection.

(2) A party shall file a motion for leave to serve additional interrogatories on a party with the administrative law judge before serving additional interrogatories on a party. The administrative law judge shall grant the motion only if the party shows good cause for the party's failure to inquire about the information previously and that the information can not reasonably be obtained using less burdensome discovery methods or be obtained from other sources.

(l) *Requests for admission.* A party may serve a written request for admission of the truth of any matter within the scope of discovery under this section or the authenticity of any document described in the request. A party shall set forth each request for admission separately. A party shall serve copies of documents referenced in the request for admission unless the documents have been provided or are reasonably available for inspection and copying.

(1) *Time.* A party's failure to respond to a request for admission, in writing and signed by the attorney or the party, not later than 30 days after service of the request, is deemed an admission of the truth of the statement or statements contained in the request for admission. The administrative law judge may determine that a failure to respond to a request

for admission is not deemed an admission of the truth if a party shows that the failure was due to circumstances beyond the control of the party or the party's attorney.

(2) *Response.* A party may object to a request for admission and shall state the reasons for objection. A party may specifically deny the truth of the matter or describe the reasons why the party is unable to truthfully deny or admit the matter. If a party is unable to deny or admit the truth of the matter, the party shall show that the party has made reasonable inquiry into the matter or that the information known to, or readily-obtainable by, the party is insufficient to enable the party to admit or deny the matter. A party may admit or deny any part of the request for admission. If the administrative law judge determines that a response does not comply with the requirements of this rule or that the response is insufficient, the matter is deemed admitted.

(3) *Effect of admission.* Any matter admitted or deemed admitted under this section is conclusively established for the purpose of the hearing and appeal. Any matter admitted or deemed admitted under this section that results in a finding of violation may be used by the Administrator in a subsequent enforcement proceeding.

(m) *Motion to compel discovery.* A party may make a motion to compel discovery if a person refuses to answer a question during a deposition, a party fails or refuses to answer an interrogatory, if a person gives an evasive or incomplete answer during a deposition or when responding to an interrogatory, or a party fails or refuses to produce documents or tangible items. During a deposition, the proponent of a question may complete the deposition or may ad-

journ the examination before making a motion to compel if a person refuses to answer.

(n) *Failure to comply with a discovery order or order to compel.* If a party fails to comply with a discovery order or an order to compel, the administrative law judge, limited to the extent of the party's failure to comply with the discovery order or motion to compel, may—

(1) Strike that portion of a party's pleadings;

(2) Preclude prehearing or discovery motions by that party;

(3) Preclude admission of that portion of a party's evidence at the hearing; or

(4) Preclude that portion of the testimony of that party's witnesses at the hearing.

§ 13.221 Notice of hearing.

(a) *Notice.* The administrative law judge shall give each party at least 60 days notice of the date and time of the hearing.

(b) *Date and time of the hearing.* The administrative law judge to whom the proceedings have been assigned shall set a reasonable date and time for the hearing. The administrative law judge shall consider the need for discovery and any joint procedural or discovery schedule submitted by the parties when determining the hearing date.

(c) *Location of the hearing.* After assignment of an administrative law judge to the proceedings, a party may file a motion to change the location of the hearing or the administrative law judge on his own motion may change the location of the hearing. The administrative law judge shall give due regard to where the majority of the witnesses reside or work, the convenience of the parties, and whether the location is served by scheduled air carrier.

(d) *Earlier hearing.* With the consent of the administrative law judge, the parties may agree to hold the hearing on an earlier date then the date specified in the notice of hearing.

§ 13.222 Evidence.

(a) *General.* A party is entitled to present the party's case or defense by oral, documentary, or demonstrative evidence, to submit rebuttal evidence, and to conduct any cross-examination that may be required for a full and true disclosure of the facts.

(b) *Admissibility.* A party may introduce any oral, documentary, or demonstrative evidence in support of the party's case or defense. The administrative law judge shall admit any oral, documentary, or demonstrative evidence introduced by a party but shall exclude irrelevant, immaterial, or unduly repetitious evidence.

(c) *Hearsay evidence.* Hearsay evidence is admissible in proceedings governed by this subpart. The fact that evidence submitted by a party is hearsay goes only to the weight of the evidence and does not affect its admissibility.

§ 13.223 Standard of proof.

The administrative law judge shall issue an initial decision or shall rule in a party's favor only if the decision or ruling is supported by, and in accordance with, the reliable, probative, and substantial evidence contained in the record. In order to prevail, the party with the burden of proof shall prove the party's case or defense by a preponderance of reliable, probative, and substantial evidence.

§ 13.224 Burden of proof.

(a) Except in the case of an affirmative defense, the burden of proof is on the agency.

(b) Except as otherwise provided by statute or rule, the proponent of a motion, request, or order has the burden of proof.

(c) A party who has asserted an affirmative defense has the burden of proving the affirmative defense.

§ 13.225 Offer of proof.

A party whose evidence has been excluded by a ruling of the administrative law judge may offer the evidence for the record on appeal.

§ 13.226 Public disclosure of evidence.

(a) The administrative law judge may order that any information contained in the record be withheld from public disclosure. Any person may object to disclosure of information in the record by filing a written motion to withhold specific information with the administrative law judge and serving a copy of the motion on each party. The party shall state the specific grounds for nondisclosure in the motion.

(b) The administrative law judge shall grant the motion to withhold information in the record if, based on the motion and any response to the motion, the administrative law judge determines that disclosure would be detrimental to aviation safety, disclosure would not be in the public interest, or that the information is not otherwise required to be made available to the public.

§ 13.227 Testimony by agency employees.

An employee of the agency may not testify as an expert or opinion witness, for any party other than the agency, in any proceeding governed by this subpart. An employee of the agency may testify in a proceeding governed by this subpart only as to facts, within the employee's personal knowledge, giving rise to the incident or violation.

§ 13.228 Subpoenas.

(a) *Request for subpoena.* A party may obtain a subpoena to compel the attendance of a witness at a deposition or hearing or to require the production of documents or tangible items from the hearing docket clerk. The hearing docket clerk shall deliver the subpoena, signed by the hearing docket clerk or an administrative law judge but otherwise in blank, to the party. The party shall complete the subpoena, stating the title of the action and the date and time for the witness' attendance or production of documents or items. The party who obtained the subpoena shall serve the subpoena on the witness.

(b) *Motion to quash or modify the subpoena.* Any person upon whom a subpoena has been served may file a motion to quash or modify the subpoena with the administrative law judge at or before the time specified in the subpoena for compliance. The applicant shall describe, in detail, the basis for the application to quash or modify the subpoena including, but not limited to, a statement that the testimony or the documents or tangible evidence is not relevant to the proceeding, that that subpoena is not reasonably tailored to the scope of the proceeding, or that the subpoena is unreasonable and oppressive. A motion to quash or modify the subpoena will stay the effect of

the subpoena pending a decision by the administrative law judge on the motion.

(c) *Enforcement of subpoena.* Upon a showing that a person has failed or refused to comply with a subpoena, a party may apply to the local Federal district court to seek judicial enforcement of the subpoena in accordance with section 1004 of the Federal Aviation Act of 1958, as amended.

§ 13.229 Witness fees.

(a) *General.* Unless otherwise authorized by the administrative law judge, the party who applies for a subpoena to compel the attendance of a witness at a deposition or hearing, or the party at whose request a witness appears at a deposition or hearing, shall pay the witness fees described in this section.

(b) *Amount.* Except for an FAA employee who appears at the direction of the agency, a witness who appears at a disposition or hearing is entitled to the same fees and mileage expenses as are paid to a witness in a court of the United States in comparable circumstances.

§ 13.230 Record.

(a) *Exclusive record.* The transcript of all testimony in the hearing, all exhibits received into evidence, and all motion, applications, requests, and rulings shall constitute the exclusive record for decision of the proceedings and the basis for the issuance of any orders in the proceeding. Any proceedings regarding the disqualification of an administrative law judge shall be included in the record.

(b) *Examination and copying of record.* Any person may examine the record at the Hearing Docket, Federal Aviation Administration, 800 Independence

Avenue SW., Room 914E, Washington, DC 20591. Any person may have a copy of the record after payment of reasonable costs to copy the record.

§ 13.231 Argument before the administrative law judge.

(a) *Arguments during the hearing.* During the hearing, the administrative law judge shall give the parties a reasonable opportunity to present oral arguments on the record supporting or opposing motions, objections, and rulings if the parties request an opportunity for argument. Only in a clearly complex or unusual case, the administrative law judge may request or the parties may agree to file written arguments with the administrative law judge.

(b) *Final oral argument.* At the conclusion of the hearing and before the administrative law judge issues an initial decision in the proceedings, the parties are entitled to submit oral proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. At the conclusion of the hearing, a party may waive final oral argument.

(c) *Posthearing briefs.* Only in a clearly complex or unusual case, the administrative law judge may request or the parties may agree to file written posthearing briefs, instead of final oral argument, before the administrative law judge issues an initial decision in the proceedings. If a party files a written posthearing brief, the party shall include proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. The administrative law judge shall give the parties

a reasonable opportunity, not more than 30 days after receipt of the transcript, to prepare and submit the briefs.

§ 13.232 Initial decision.

(a) *Contents.* The administrative law judge shall issue an initial decision at the conclusion of the hearing and may affirm, modify, or reverse the order of civil penalty. In each oral or written decision, the administrative law judge shall include findings of fact and conclusions of law, and the grounds supporting those findings and conclusions, upon all material issues of fact, the credibility of witnesses, the applicable law, any exercise of the administrative law judge's discretion, the reasonableness of any sanction contained in the order of civil penalty, and a discussion of the basis for any order issued in the proceedings. The administrative law judge is not required to provide a written explanation for rulings on objections, procedural motions, and other matters not directly relevant to the substance of the initial decision. If the administrative law judge reduces the civil penalty contained in the order of civil penalty, the administrative law judge shall provide a basis supporting the reduction in civil penalty. If the administrative law judge refers to any previous unreported or unpublished initial decision, the administrative law judge shall make copies of that initial decision available to the parties and the FAA decisionmaker.

(b) *Oral decision.* Except as provided in paragraph (c) of this section, at the conclusion of the hearing, the administrative law judge shall issue the initial decision and order orally on the record.

(c) *Written decision.* Only in a clearly complex or unusual case, the administrative law judge may

issue a written initial decision not later than 30 days after the conclusion of the hearing or submission of the last posthearing brief. The administrative law judge shall serve a copy of the written initial decision on each party.

(d) *Order assessing civil penalty.* If the administrative law judge affirms or modifies the order of civil penalty, the order shall become an order assessing civil penalty.

§ 13.233 Appeals from initial decisions.

(a) *Notice of appeal.* A party may appeal the initial decision, and any decision not previously appealed pursuant to § 13.219, by filing a notice of appeal with the FAA decisionmaker. A party shall file the notice of appeal with the Federal Aviation Administration, 800 Independence Avenue SW., Room 914E, Washington, DC 20591, Attn: Appellate Docket Clerk. A party shall file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or service of the written initial decision on the parties and shall serve a copy of the notice of appeal on each party.

(b) *Issues on appeal.* A party may appeal only the following issues:

(1) Whether each filing of fact is supported by a preponderance of reliable, probative, and substantial evidence;

(2) Whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and

(3) Whether the administrative law judge committed any prejudicial errors during the hearing that support the appeal.

(c) *Perfecting an appeal.* Unless otherwise agreed by the parties, a party shall perfect an appeal, not later than 50 days after entry of the oral initial decision on the record or service of the written initial decision on the party, by filing an appeal brief with the FAA decisionmaker.

(1) *Extension of time by agreement of the parties.* The parties may agree to extend the time for perfecting the appeal with the consent of the FAA decisionmaker. If the FAA decisionmaker grants an extension of time to perfect the appeal, the appellate docket clerk shall serve a letter confirming the extension of time on each party.

(2) *Written motion for extension.* If the parties do not agree to an extension of time for perfecting an appeal, a party desiring an extension of time may file a written motion for an extension with the FAA decisionmaker and shall serve a copy of the motion on each party. The FAA decisionmaker may grant an extension if good cause for the extension is shown in the motion.

(d) *Appeal briefs.* A party shall file the appeal brief with the FAA decisionmaker and shall serve a copy of the appeal brief on each party.

(1) A party shall set forth, in detail, the party's specific objections to the initial decision or rulings in the appeal brief. A party also shall set forth, in detail, the basis for the appeal, the reasons supporting the appeal, and the relief requested in the appeal. If the party relies on evidence contained in the record for the appeal, the party shall specifically refer to the pertinent evidence contained in the transcript in the appeal brief.

(2) The FAA decisionmaker may dismiss an appeal, on the FAA decisionmaker's own initiative or upon motion of any other party, where a party has

filed a notice of appeal but fails to perfect the appeal by timely filing of an appeal brief with the FAA decisionmaker.

(e) *Reply brief.* Unless otherwise agreed by the parties, any party may file a reply brief with the FAA decisionmaker not later than 35 days after the appeal brief has been served on that party. The party filing the reply brief shall serve a copy of the reply brief on each party. If the party relies on evidence contained in the record for the reply, the party shall specifically refer to the pertinent evidence contained in the transcript in the reply brief.

(1) *Extension of time by agreement of the parties.* The parties may agree to extend the time for filing a reply brief with the consent of the FAA decisionmaker. If the FAA decisionmaker grants an extension of time to file the reply brief, the appellate docket clerk shall serve a letter confirming the extension of time on each party.

(2) *Written motion for extension.* If the parties do not agree to an extension of time for filing a reply brief, a party desiring an extension of time may file a written motion for an extension with the FAA decisionmaker and shall serve a copy of the motion on each party. The FAA decisionmaker may grant an extension if good cause for the extension is shown in the motion.

(f) *Other briefs.* The FAA decisionmaker may allow any person to submit an *amicus curiae* brief in an appeal of an initial decision. A party may not file more than one appeal brief or reply brief. A party may petition the FAA decisionmaker, in writing, for leave to file an additional brief and shall serve a copy of the petition on each party. The party may not file the additional brief with the petition. The FAA decisionmaker may grant leave to file an additional brief

if the party demonstrates good cause for allowing additional argument on the appeal. The FAA decisionmaker will allow a reasonable time for the party to file the additional brief.

(g) *Number of copies.* A party shall file the original appeal brief or the original reply brief, and 2 copies of the brief, with the FAA decisionmaker.

(h) *Oral argument.* The FAA decisionmaker has sole discretion to permit oral argument on the appeal. On the FAA decisionmaker's own initiative or upon written motion by any party, the FAA decisionmaker may find that oral argument will contribute substantially to the development of the issues on appeal and may grant the parties an opportunity for oral argument.

(i) *Waiver of objections on appeal.* If a party fails to object to any alleged error regarding the proceedings in an appeal or a reply brief, the party waives any objection to the alleged error. The FAA decisionmaker is not required to consider any objection in an appeal brief or any argument in the reply brief if a party's objection is based on evidence contained on the record and the party does not specifically refer to the pertinent evidence from the record in the brief.

(j) *FAA decisionmaker's decision on appeal.* The FAA decisionmaker will review the briefs on appeal and the oral argument, if any, to determine if the administrative law judge committed prejudicial error in the proceedings or that the order should be affirmed, modified, or reversed. The FAA decisionmaker may affirm, modify, or reverse the initial decision, make any necessary findings, or may remand the case for any proceedings that the FAA decisionmaker determines may be necessary.

(1) The FAA decisionmaker may raise any issue, on the FAA decisionmaker's own initiative, that is required for proper disposition of the proceedings. The FAA decisionmaker will give the parties a reasonable opportunity to submit arguments on the new issues before making a decision on appeal.

(2) The FAA decisionmaker will issue the final decision and order of the Administrator on appeal in writing and will serve a copy of the decision and order on each party.

(3) A final decision and order of the Administrator after appeal is precedent in any other civil penalty action. Any issue, finding or conclusion, order, ruling, or initial decision of an administrative law judge that has not been appealed to the FAA decisionmaker is not precedent in any other civil penalty action.

§ 13.234 Petitions to reconsider or modify a final decision and order of the FAA decisionmaker on appeal.

(a) *General.* Any party may petition the FAA decisionmaker to reconsider or modify a final decision and order issued by the FAA decisionmaker on appeal from an initial decision. A party shall file a petition to reconsider or modify with the FAA decisionmaker not later than 30 days after service of the FAA decisionmaker's final decision and order on appeal and shall serve a copy of the petition on each party. The FAA decisionmaker will not reconsider or modify an initial decision and order issued by an administrative law judge that has not been appealed by any party to the FAA decisionmaker.

(b) *Form and number of copies.* A party shall file a petition to reconsider or modify in writing with the

FAA decisionmaker. The party shall file the original petition with the FAA decisionmaker and shall serve a copy of the petition on each party.

(c) *Contents.* A party shall state briefly and specifically the alleged errors in the final decision and order on appeal, the relief sought by the party, and the grounds that support the petition to reconsider or modify.

(1) If the petition is based, in whole or in part, on allegations regarding the consequences of the FAA decisionmaker's decision, the party shall describe these allegations and shall describe, and support, the basis for the allegations.

(2) If the petition is based, in whole or in part, on new material not previously raised in the proceedings, the party shall set forth the new material and include affidavits of prospective witnesses and authenticated documents that would be introduced in support of the new material. The party shall explain, in detail, why the new material was not discovered through due diligence prior to the hearing.

(d) *Repetitious and frivolous petitions.* The FAA decisionmaker will not consider repetitious or frivolous petitions. The FAA decisionmaker may summarily dismiss repetitious or frivolous petitions to reconsider or modify.

(e) *Reply petitions.* Any other party may reply to a petition to reconsider or modify, not later than 10 days after service of the petition on that party, by filing a reply with the FAA decisionmaker. A party shall serve a copy of the reply on each party.

(f) *Effect of filing petition.* Unless otherwise ordered by the FAA decisionmaker, filing of a petition pursuant to this section will not stay or delay the effective date of the FAA decisionmaker's final decision

and order on appeal and shall not toll the time allowed for judicial review.

(g) *FAA decisionmaker's decision on petition.* The FAA decisionmaker has sole discretion to grant or deny a petition to reconsider or modify. The FAA decisionmaker will grant or deny a petition to reconsider or modify within a reasonable time after receipt of the petition or receipt of the reply petition, if any. The FAA decisionmaker may affirm, modify, or reverse the final decision and order on appeal, or may remand the case for any proceedings that the FAA decisionmaker determines may be necessary.

§ 13.235 Judicial review of final decision and order.

A person may seek judicial review of a final decision and order of the Administrator as provided in § 1006 of the Federal Aviation Act of 1958, as amended. A party seeking judicial review of a final decision and order shall file a petition for review not later than 60 days after the final decision and order has been served on the party.

Issued in Washington, DC, on August 31, 1988.

T. Allan McArtor,
Administrator

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APPENDIX E

STATUTORY PROVISIONS INVOLVED

1. Sections 551(4) and 553 of Title 5 of the United States Code provide:

§ 551. Definitions

For the purpose of this subchapter— * * *

* * * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either

personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

2. Section 204(g) of the Airport and Airway Safety and Capacity Expansion Act of 1987, 49 U.S.C. App. 1475 (Supp. V 1987), provides:

§ 1475. Civil penalty assessment demonstration program

(a) Civil penalty

The Administrator, or his delegate, may assess a civil penalty for a violation arising under this chapter or a rule, regulation, or order issued thereunder, upon written notice and finding of violation by the Administrator.

(b) No reexamination of liability or amount

In the case of a civil penalty assessed by the Administrator in accordance with this section, the issue of liability or amount of civil penalty

shall not be reexamined in any subsequent suit for collection of such civil penalty.

(c) Continuing jurisdiction of district courts

Notwithstanding subsection (a) of this section, the United States district courts shall have exclusive jurisdiction of any civil penalty action initiated by the Administrator (1) which involves an amount in controversy in excess of $50,000; (2) which is an in rem action or in which an in rem action based on the same violation has been brought; (3) regarding which an aircraft subject to lien has been seized by the United States; and (4) in which a suit for injunctive relief based on the violation giving rise to the civil penalty has also been brought.

(d) Limitations

(1) Hearing

A civil penalty may be assessed under this section only after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5.

(2) Violations

This section only applies to civil penalties initiated by the Administrator after December 30, 1987.

(3) Maximum amount

The maximum amount of a civil penalty which may be assessed under this section in any case may not exceed $50,000.

(4) Effective period

The provisions of this section shall only be in effect for the 2-year period beginning on December 30, 1987.[*]

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* This period has been extended, most recently through July 1992. See Act of Aug. 15, 1990, Pub. L. No. 101-370, 104 Stat. 451.

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IN THE
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OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,
v.
AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENT AIR TRANSPORT ASSOCIATION OF AMERICA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government's challenge to the court of appeals decision, which required the Federal Aviation Administration to issue Rules of Practice for its Civil Penalty Proceedings only after notice and comment under the Administrative Procedure Act, still presents a justiciable case or controversy, even though the government (1) has fully complied with the court of appeals' judgment by issuing a Final Rule that was subject to notice and comment, and (2) has not reserved any right or stated any desire to rescind that Final Rule? If so,

2. Whether FAA's comprehensive Rules of Practice in Civil Penalty Proceedings were subject to the notice-and-comment requirements of the Administrative Procedure Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
COUNTER-STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: Page

Baker v. *Carr*, 369 U.S. 186 (1962) 7
Chemical Manufacturers Association v. *National Resources Defense Council, Inc.*, 470 U.S. 116 (1985) 4, 5, 6
City of Mesquite v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982) 5, 6
Cornelius v. *N.A.A.C.P. Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985) 4
County of Los Angeles v. *Davis*, 440 U.S. 625 (1979) 5
Deakins v. *Monaghan*, 484 U.S. 193 (1988) 4
Hall v. *Beals*, 396 U.S. 45 (1969) 6
Honig v. *Doe*, 484 U.S. 305 (1988) 4
Maher v. *Roe*, 432 U.S. 464 (1977) 4
Playter v. *FAA*, No. 90-3420 (6th Cir.) 9
Princeton University v. *Schmidt*, 455 U.S. 100 (1982) 4, 5, 6
Southern California Edison Co. v. *FERC*, 770 F.2d 779 (9th Cir. 1985) 8

CONSTITUTIONAL PROVISIONS:

Article III 4

ADMINISTRATIVE MATERIALS:

55 Fed. Reg. 7980 (March 6, 1990) 2, 5
55 Fed. Reg. 15,110 (April 20, 1990) 2, 6
55 Fed. Reg. 15,134 (April 20, 1990) 3
55 Fed. Reg. 27,548 (July 3, 1990) 3, 6

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BRIEF OF RESPONDENT AIR TRANSPORT ASSOCIATION OF AMERICA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of respondent Air Transport Association of America in opposition to the United States Department of Transportation's petition for a writ of certiorari.[1]

COUNTER-STATEMENT OF THE CASE

The government's statement of the case is accurate as far as it goes. It notes, for example, that prior to

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[1] Respondent Air Transport Association of America is advised that the respondent-intervenors concur with this Brief and will not file separately.

the court of appeals' issuance of its opinion in this case, the Federal Aviation Administration ("FAA") had already initiated a proposed rulemaking that published, for notice and comment, many of the rules at issue here.

The government nevertheless omits an important fact. FAA initiated that rulemaking procedure entirely independently of this action and wholly out of deference to the Congress and the Administrative Conference of the United States. As FAA stated in its Notice of Proposed Rulemaking, that notice was "intended to fulfill a commitment made by the agency to the members of the House Subcommittee on Public Works and Transportation at [a] hearing held on November 15, 1990." 55 Fed. Reg. 7980 (March 6, 1990). At that hearing, the then-current rules of practice had "received a significant amount of criticism from the witnesses representing the aviation community," and "the nature and extent of that criticism resulted in only a 4-month [Congressional] extension of FAA's authority" to conduct civil penalty proceedings. 55 Fed. Reg. at 7981.

That Congressional Committee was not, however, the only governmental entity urging changes in the Rules of Practice. The Committee on Adjudication of the Administrative Conference of the United States likewise recommended changes. And FAA was careful to note that the changes it "proposed in the [March 6th Notice of Proposed Rulemaking] and adopted herein addressed the procedural modifications suggested by the Committee on Adjudication." 55 Fed. Reg. 15,110-15,111 (April 20, 1990); *see also* 55 Fed. Reg. at 7981.

Finally, after the court of appeals' judgment came down, FAA did not seek a stay, either from the court

of appeals or from this Court. Rather, as the government concedes, FAA fully complied with that judgment by publishing notice and receiving comment on a full set of amended proposed Rules of Practice for Civil Penalty Proceedings. 55 Fed. Reg. 15,134 (April 20, 1990).[2] Then, as the government acknowledges, "final, amended rules of practice were issued, after the agency had comments received from the public, on July 3, 1990." Petition for a Writ of Certiorari ("Pet."), at 7. *See* 55 Fed. Reg. 27,548 (July 3, 1990). Moreover, in publishing those Final Rules, FAA again noted that it was thereby satisfying several objections made to its former rules of procedure by the Administrative Conference. *See* 55 Fed. Reg. at 27,549.

In sum, the government acknowledges that it has already done everything required of it by the court of appeals. It neglects to mention, however, that those actions were taken partially out of obedience to the court of appeals, partially to satisfy a promise FAA had made to Congress, and partially out of deference to the Administrative Conference. These facts are important because they demonstrate the overwhelming likelihood that FAA will not revive its former, challenged rules even if it prevails in this Court.

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[2] Indeed, FAA's amended rules did more than just comply with the Court of Appeals' judgment. Even though the Court of Appeals did not reach respondents' substantive challenges to the rules, FAA's amended rules nevertheless cured all of respondent's substantive objections.

REASONS FOR DENYING THE PETITION

It is very doubtful that there is any longer a live case or controversy among the parties. Of course, "[u]nder Article III of the Constitution this Court may only adjudicate actual, ongoing controversies. That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires." *Honig* v. *Doe*, 484 U.S. 305, 317 (1988). *See also Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988).

1. Where, as here, a regulatory agency substantially changes regulations that are under challenge, and does not indicate any desire to revive its former regulations, the challenge is moot. Thus, in *Princeton University* v. *Schmidt*, 455 U.S. 100 (1982) (*per curiam*), this Court held that an action challenging certain University speech regulations that had since been modified was moot because the University showed no inclination to reinstate its former regulations. 455 U.S. at 103; *see City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 296 n.* (White, J., concurring in part and dissenting in part). Likewise, in *Cornelius* v. *N.A.A.C.P. Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985), the Court reached the merits of a challenge to superseded regulations, which had been invalidated by the court of appeals, only because "OPM's position before this Court [was] consistent with a desire to reinstate its prior regulations. Given these circumstances, the revision of the regulations at issue d[id] not render th[e] case moot." 473 U.S. at 791 n.1 (citation omitted). *See also Maher* v. *Roe*, 432 U.S. 464, 468-469 n.4 (1977) (revisions to challenged state regu-

lations, that were apparently made only "for the purpose of interim compliance," did not moot case "submitted on the theory that Connecticut desires to reinstate the invalidated regulation"); *Chemical Manufacturers Association* v. *National Resources Defense Council, Inc.*, 470 U.S. 116, 136 n.2 (1985) (Marshall, J., dissenting in part) (joined by Blackmun, Stevens and O'Connor, J.J.) ("EPA's position before this Court is consistent with the view that it desires to reinstate its prior regulation. Given all of these circumstances, the revision of the regulation does not render this case moot.").[3]

The government's petition in this case, however, carefully avoids making any representation that FAA plans to revive its former regulations. It is easy to see why. As the government acknowledges, many of its changes to the Rules of Practice were made for reasons entirely independent of this case. They were "intended to fulfill a commitment made by the agency to the members of the House Subcommittee on Public Works and Transportation . . . ." (55 Fed. Reg. at 7980), and were apparently also motivated in part by certain criticisms made by the Administrative Conference. *See* 55 Fed. Reg. at 7981 ("The agency has . . . propose[d] changes to the rules of practice that address the recommended revisions . . . contained in" the draft report of the Administrative Conference.);

[3] The Court views claims of mootness somewhat more skeptically when it is the same party that voluntarily changed its requirements that seeks thereby to avoid federal court jurisdiction. *Cf. Princeton University*, 455 U.S. at 103, *with City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 288 & n.11 (1982). Nevertheless, even that higher standard may be met on a proper showing. *See, e.g., County of Los Angeles* v. *Davis*, 440 U.S. 625, 631-634 (1979).

see also 55 Fed. Reg. at 15,110; 55 Fed. Reg. at 27,549.

FAA will, no doubt, honor its commitment to the Congress regardless of how this Court might rule on the decision below. Moreover, the rules revised in response to Congress and out of deference to the Administrative Conference are thoroughly integrated with the revisions made out of obedience to the court of appeals. It is therefore unlikely in the extreme that FAA will offend Congress, the Administrative Conference and good sense by unravelling its regulations, discarding what this Court might permit it to discard but retaining what it has promised Congress it would keep.[4]

This case is therefore even more obviously moot than *Princeton University, supra.* There, "Princeton [merely] gave no indication that it desired to return to the original regulatory scheme and would do so absent a judicial barrier." *City of Mesquite,* 455 U.S. at 296 n.* (White, J., concurring in part and dissenting in part). Here, not only is there no indication by FAA that it would return to its former rules if permitted to do so, there is every indication that it will *not* return to its original rules, regardless of what this Court holds. Consequently, this case has "lost its character as a preesnt, live controversy of the kind that must exist if [courts] are to avoid advisory opinions on abstract propositions of law." *Hall* v. *Beals,* 396 U.S. 45, 48 n.5 (1969).

2. Respondent no longer possesses "such a personal stake in the outcome of the controversy as to

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[4] Indeed, were the FAA now partially to repeal its new regulations, its action would probably be vulnerable to challenge as arbitrary and capricious.

assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . ." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Respondent already has won all of what it sued to obtain. It challenged eight parts of the Rules of Practice. All eight parts were satisfactorily changed in the 1990 notice-and-comment rulemakings. Thus, respondent has nothing further to win in this Court. As a practical matter, respondent has nothing further to lose, either. Given the government's apparent lack of desire to revive its former regulations even if it prevails, respondent will continue to enjoy the benefits of the amended Rules of Practice regardless of whether it "wins" or "loses" here.

The government mistakenly claims that "at least some" of the parties to the case "retain an interest in [its] outcome." Pet. 23 n.20.1.[5] That is so, the government argues, because some respondents are membership organizations or air carriers "that are parties to [other] proceedings in which the Rules of Practice were applied at some point." *Ibid.* But that argument proves, at most, that those *other proceedings* are not yet moot. The present case neither concerns the substance of the regulations nor comprehends any civil penalty proceedings against anyone. (Indeed, for that reason, the government argued below that respondents' substantive challenge was not ripe. *See* Pet. App. at 7a).[6]

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[5] The government concedes that the "case is moot as to [the] individual[]" intervenors because the civil penalty proceedings previously pending against them have since been dismissed. Pet. 23 n.20.

[6] The court of appeals never reached respondents' substantive challenge to the regulations. *See* Pet. App. 7a.

All that remains of this case, therefore, is the government's philosophical disagreement with that portion of the court of appeals' judgment with which it has already fully and finally complied—the court's procedural ruling that whatever Rules of Practice FAA promulgated had to be subject to notice-and-comment under the A.P.A. That abstract legal question, which so fascinates the government, is of little interest to respondent. Respondent's concern throughout this litigation has been with the *substantive* provisions of the Rules of Practice. Now that FAA has revised the Rules, respondent is fully satisfied.

3. The government's argument that there is a split among the circuits is similarly rarified. The government does not claim that there is a split among the courts of appeals over either the substance of FAA's Rules of Practice or over whether their issuance required notice and hearing. Rather, the government points to a "square conflict" with *Southern California Edison Co.* v. *FERC*, 770 F.2d 779 (9th Cir. 1985), which held that a different provision of a different regulation—one concerned with the setting of utility rates—was not subject to notice-and-comment rulemaking. The conflict exists, the government explains, because the court of appeals in *Southern California Edison* rejected an argument under the A.P.A. similar to one the court of appeals accepted in this case.

Even assuming that this analytical divergence—which the government concedes is at least 11 years old (Pet. 20)—requires resolution by this Court,[7]

[7] As another indication of how "square" and "important" the supposed conflict is, the government did not even cite *Southern California Edison* to the court of appeals.

any such resolutions should await a true case or controversy that properly presents the question. If the government is correct in its prediction of the number of pending actions potentially affected by the court of appeals decision (Pet. 21-23), it should have little difficulty bringing an appropriate and live case to this Court's attention.[8]

CONCLUSION

For the stated reasons, the petition should be denied.

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December 5, 1990

[8] Indeed, according to the government's petition, one such case has already been fully briefed in the Sixth Circuit: *Playter* v. *F.A.A.*, No. 90-3420. *See* Pet. at 22 n.19.

(3)

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AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

MEMORANDUM SUGGESTING THAT THE CASE IS MOOT

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Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

MEMORANDUM SUGGESTING THAT THE CASE IS MOOT

Respondents respectfully suggest that this case is moot. Respondent Air Transport Association of America (ATA) explained the legal basis for this suggestion in its Brief in Opposition to the Petition for Certiorari. *See* Brief of Respondent Air Transport Association of America in Opposition to the Petition for a Writ of Certiorari, pp. 1-9. In petitioners' subsequent Reply, the Government requested, with regard to the mootness issue, that respondents indicate whether they would be willing to accede to vacation of the judgment of the Court of Appeals and to dismissal of the Petition for Review. Reply Brief of

Petitioners, pp. 6-7. This Memorandum is intended to inform both the Court and the Government of respondents' answer to the Government's question.

All respondents in this case persist with their conclusion that the case is moot. Because FAA already has amended the Final Rule that prompted the Petition for Review, respondents have no further interest in the judgment of the Court of Appeals and are willing not to rely upon it further. Furthermore, respondents seek no judicial relief with regard to the Rule. In particular, neither respondents themselves nor the members of respondents ATA, National Air Carrier Association, Inc. (NACA), Air Line Pilots Association (ALPA), Aircraft Owners and Pilots Association (AOPA) have an interest in challenging the validity of the Final Rule now or in the future, on the grounds advanced by respondents in the Court of Appeals, in civil penalty proceedings conducted in any part under the Final Rule or in cases seeking judicial review of penalties assessed in such proceedings.[1] As a result, respondents do not oppose an order from this Court vacating the Court of Appeals' judgment as moot and dismissing the Petition for Review with prejudice. *See Deakins v. Monaghan*, 484 U.S. 193, 199-200 (1988); *United States Department of State v. Washington Post*, 464 U.S. 979 (1983) (Mem.) (After grant of petition for a writ of certiorari, respondent withdrew its request for judicial relief, and the United States filed Memorandum Suggesting Mootness, which was accepted by the Court).

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[1] In this case, respondents ATA, NACA, ALPA, and AOPA have pursued judicial review of the Final Rule as representatives of their members.

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PETITIONERS

v.

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF PETITIONERS IN RESPONSE TO RESPONDENTS' SUGGESTION OF MOOTNESS

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TABLE OF AUTHORITIES

	Page
Cases:	
Deakins v. *Monaghan*, 484 U.S. 193 (1988)	2, 3
Frank v. *Minnesota Newspaper Ass'n, Inc.*, 490 U.S. 225 (1989)	2
Statute:	
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:	
5 U.S.C. 553(b)	2
5 U.S.C. 553(b)(A)	2

In the Supreme Court of the United States

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF PETITIONERS
IN RESPONSE TO RESPONDENTS' SUGGESTION
OF MOOTNESS

Respondents have filed a memorandum suggesting that this case is moot. In view of respondents' representation that neither they nor their members have an interest in challenging the validity of the rules at issue in this or any other proceeding, and their expressed willingness to accept an order vacating the court of appeals' judgment and remanding with a direction to dismiss the petition for review *with prejudice*, we agree that the case is now moot.

In this case, acting on respondents' petition for review, the court of appeals invalidated Rules of Practice applicable in civil penalty proceedings conducted by the Federal Aviation Administration (Pet. App. 33a-91a), on the ground that the regulations had not been issued in accordance with the

notice-and-comment requirement of the Administrative Procedure Act, 5 U.S.C. 553(b). The petition for a writ of certiorari sought further review of the question whether the Rules of Practice fell within the exception to that requirement for "rules of agency organization, procedure, or practice" (5 U.S.C. 553(b)(A)).

Following the entry of the court of appeals' judgment, the FAA completed a rulemaking amending the rules in certain respects and, after providing notice and an opportunity for comment, repromulgated the rules in their entirety. See Pet. 7, 21-23. In light of these events, respondents' brief in opposition argued that the case had become moot. ATA Br. in Opp. 1-9. In our reply brief, we argued that because respondents or their members could invoke the court of appeals' judgment in seeking to invalidate penalties assessed in proceedings conducted in some part under the original rules, there was a continuing controversy as to those rules' validity. Reply Br. 2-5. We suggested, however, that representations by the respondents along the lines indicated by *Frank* v. *Minnesota Newspaper Ass'n, Inc.*, 490 U.S. 225 (1989), and *Deakins* v. *Monaghan*, 484 U.S. 193, 199-200 & n.4 (1988), would render the case moot. Reply Br. 6-7. This Court granted certiorari.

Although respondents did not undertake to make such representations prior to this Court's granting the petition for a writ of certiorari, they have now done so in their memorandum suggesting mootness. The respondents have advised the Court that they have no further interest in the court of appeals' judgment; that they no longer seek judicial relief with regard to the original rules; that respondents (and members of those respondents that have pursued this case on behalf of their members) have no interest in challenging the validity of the original rules now or in the future, on grounds advanced in the court of appeals, in individual penalty proceedings conducted in any part under the original

rules or in cases seeking judicial review of penalties assessed in such proceedings; and that respondents do not oppose vacation of the court of appeals' judgment and dismissal of their petition for review with prejudice.

On the basis of those unequivocal representations, we agree that the case is now moot. We emphasize that our position is based, in particular, on respondents' willingness to accept the dismissal of their petition for review *with prejudice*. That was the disposition that this Court directed in *Deakins* v. *Monaghan*, 484 U.S. at 200 & n.4, 204, in a similar situation. As in *Deakins*, a dismissal with prejudice is necessary to protect the government against the possibility that respondents themselves or members of those respondents that have proceeded in a representative capacity could, in some other proceeding, assert the claims raised by the petition for review.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded to the court of appeals with a direction to dismiss the petition for review with prejudice.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

FEBRUARY 1991

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* The Solicitor General is disqualified in this case.

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